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A TREATISE
ON THE
LAW OF EVIDENCE.

A TREATISE
ON THE
LAW OF EVIDENCE,

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH
ILLUSTRATIONS FROM THE AMERICAN AND OTHER FOREIGN LAWS.

By JOHN PITT TAYLOR, Esq.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

IN TWO VOLUMES.

VOL. II.

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Breve et efficax per exempla.—SENECA.*

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CONTINUATION OF PART II.

OF THE RULES WHICH GOVERN THE PRODUCTION OF TESTIMONY.

CHAPTER XVII.

OF THE NUMBER OF WITNESSES, AND THE NATURE AND QUANTITY OF PROOF REQUIRED IN PARTICULAR CASES (a).

§ 692. UNDER this head it is not proposed to go into an extended consideration of the Statutes of Treason or of Frauds, but only to mention briefly some instances in which those acts, and some other statutes and rules of law, have regulated particular cases, taking them out of the operation of the general principles, by which they would otherwise be governed. Thus, in regard to *treason* and *misprision of treason*, though by the common law these crimes were sufficiently proved by one credible witness (b), it has been deemed expedient to enact, that no person shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of *two lawful witnesses*, either both to the same overt act, or one to one, and the other to another overt act of the same treason, unless the accused shall willingly, without violence, in open court, confess the same (c); and further, that if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason (d).

(a) The substance of so much of this Chapter as relates to the number of witnesses has already appeared in the Law Rev., No. 7, pp. 123—135.

(b) Foster, Cr. L. 233; M'Nally Ev. 31; R. v. Clare, 28 How. St. Tr. 887, 924; Woodbeck v. Keller, 6 Cowen, 120.

(c) As to the confession, see ante, § 628.

(d) 7 Will. 3, c. 3, §§ 2, 4; extended to Ireland by 1 & 2 Geo. 4, c. 24. The acts of 1 Edw. 6, c. 12, § 22, and 5 & 6 Edw. 6, c. 11, § 12, and 1 & 2 Ph. & M. c. 10, § 11, contain provisions of a like nature.

§ 693. This protective rule, which in England has remained in its present state since the days of King William III., and in Ireland was adopted in the year 1821, has been incorporated, with some slight variation, into the constitution of America (e), and may be met with in the statutes of most, if not all, of the States in the Union. The first notice that we have of this rule, is in a repealed act of the time of Henry VIII. (f), and from the language there employed it appears probable, that the original reason for its adoption was that stated by Lord Nottingham on Lord Stafford's trial: "Anciently, all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the Parliament thought fit to appoint, that two witnesses ought to be for proof of high treason" (g). Its continuance, in modern times, may perhaps be ascribed, in part, to the obstinacy with which men cling to established forms of proceeding; in part, to the accused's oath and duty of allegiance, which may be supposed to counterpoise the information of a single witness (h); and, in part, to the heinousness of the crime of treason, which raises a presumption of innocence in favour of the accused, while the counter-presumption, that on so serious a trial no witness would be guilty of criminative perjury, is forgotten (i). But, possibly, the best reason for the regulation is, that, on state trials, the prisoner has to contend against the whole power of the Crown; that this power is especially liable to abuse in times of excitement and danger; that the law of treason is ill-defined, and worse understood; and that the consequences of a conviction, both to the accused, and to his family, are savage and revolting. A man of calm reflection may, however, consider this last reason but an indifferent one; and may think that the legislature would confer no trifling benefit on the country, if it defined the law of treason with greater accuracy, and if, by abolishing alike the cruelties which made it abhorrent, and the

(e) "No person shall be convicted of treason, unless on the testimony of *two witnesses to the same overt act*, or on confession in open court." Const. U. S. Art. 3, § 3; Laws U. S., vol. 2, ch. 36, § 1.

(f) 25 Hen. 8, c. 14.

(g) T. Raym. 408.

(h) 4 Bl. Com. 358.

(i) 3 Bentham Ev. 391, 392.

protections which make it ridiculous, it rendered the punishment of traitors more certain and less barbarous.

§ 694. Notwithstanding the above rule, any *collateral* matter, not conducing to the proof of the overt acts, may be proved by the testimony of a single witness, by the extra-judicial confession of the prisoner, or by any other evidence admissible at common law (*k*). For instance, on an indictment for treason in adhering to the Queen's enemies, the fact that the prisoner is a subject of the British Crown may be established by his admission, or by the testimony of one witness (*l*).

§ 695. It may be proper in this place to observe, that, in treason, and misprision of treason, no evidence can be given of any overt act, which is not expressly laid in the indictment (*m*). But the meaning of this rule is, not that the whole detail of facts should be set forth, but that no overt act, amounting to a *distinct independent charge*, though falling under the same head of treason, should be given in evidence, unless it be expressly laid in the indictment, or unless it distinctly conduce to the proof of any of the overt acts, which are laid (*n*). For instance, in *Layer's case* (*o*), the prisoner's correspondence with the Pretender was allowed to be read in evidence, as tending directly to prove one overt act laid, namely, the conspiring to depose the King and to place the Pretender on the throne, though this correspondence was a substantive treason in itself (*p*), and was not charged as an overt act in the indictment; and on the same ground, the publication of the Pretender's manifesto by Mr. Deacon was read against him in 1746, as strongly proving with what intention he had joined the rebel army, and as supporting the overt act laid in the indictment of marching in a warlike manner to depose the King (*q*). On the

(*k*) Foster, Cr. L. 242; 1 East, P. C. 130.

(*l*) R. v. Vaughan, 15 How. St. Tr. 535, per Lord Holt; Foster, Cr. L. 240, S. C.

(*m*) 7 Will. 3, c. 3, § 8. This section is not incorporated in the Irish act of 1 & 2 Geo. 4, c. 24, but it being also a rule at common law, this would seem to be immaterial.

(*n*) Foster, Cr. L. 245; 1 East, P. C. 121—123.

(*o*) 16 How. St. Tr. 220—223; Foster, Cr. L. 245, 246, S. C.

(*p*) By 13 Will. 3, c. 3, § 2. See 17 Geo. 2, c. 39.

(*q*) R. v. Deacon, Foster, Cr. L. 9; 18 How. St. Tr. 366, S. C.; R. v. Wedderburn, Foster, Cr. L. 22; 18 How. St. Tr. 425, S. C.

other hand, when Captain Vaughan was indicted for adhering to the King's enemies, and the overt act laid was his cruising on the King's subjects in the Loyal Clancarty, the Court rejected evidence of his cruising in another vessel; as, if it were true, it would be no sort of proof of the act, for which he was then to answer (*r*). This rule, in fact, is not peculiar to prosecutions for treason; though in consequence of the oppressive character of some former state prosecutions for that crime, it has been deemed expedient expressly to enact it in the later statutes of treason. It is nothing more than a particular application of a fundamental doctrine of the law of evidence, namely, that the proof must correspond with the allegations, and be confined to the point in issue (*s*). The issue in treason is, whether the prisoner committed that crime by doing one or more of the treasonable acts stated in the indictment; as, in defamation, the question is, whether the defendant injured the plaintiff by maliciously uttering any of the slanders laid in the declaration; and evidence of collateral facts is admitted or rejected on the like principle, in either case, accordingly as it does or does not tend to establish the specific charge. Therefore the declarations of the prisoner, and seditious language used by him, are admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged (*t*). And in support of the overt act of treason in the county mentioned in the indictment, other acts of treason, though done in other counties, may be given in evidence; subject, however, to be ultimately rejected, if the overt act, in corroboration of which they are tendered, is not proved to have been done in the county as laid (*u*).

§ 696. It remains to be noticed in connection with this subject, that the protective provisions of the Statutes of Treason (*x*) do not apply to the particular class of treasons, which consists in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, where the overt act or acts alleged shall be the assassination of

(*r*) *R. v. Vaughan*, 15 How. St. Tr. 499, 500; *Foster*, Cr. L. 246, S. C.

(*s*) *Ante*, §§ 142, 193.

(*t*) *R. v. Watson*, 2 Stark. R. 132—135.

(*u*) *R. v. Layer*, 16 How. St. Tr. 164; *R. v. Deacon*, 18 id. 367; *Foster*, Cr. L. 9, 10, S. C.; *R. v. Vane*, 6 How. St. Tr. 123—129; 1 East, P. C. 125, 126.

(*x*) 7 Ann. c. 21; 7 Will. 3, c. 3; 6 Geo. 3, c. 53, § 3.

ner Majesty, or any attempt to injure in any manner whatsoever her Royal person ; or to the misprisions of any such treason ; but in all these cases the accused shall be indicted, arraigned, tried and attainted, in the same manner, and according to the same course and order of trial, and *upon the like evidence*, as if he stood charged with murder ; though upon conviction, judgment shall be given, and execution done, as in other cases of high treason (y).

§ 697. It seems to have been formerly thought, that, in proof of the crime of *perjury*, two witnesses were *necessary* (z) ; but this strictness, if it was ever the law, has long since been relaxed ; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence (a). The oath of the opposing witness, therefore, will not avail, unless it be corroborated by material and independent circumstances ; for otherwise, there would be nothing more than the oath of one man against another, and the scale of evidence being thus exactly balanced, it is obvious that the jury could not safely convict (b). So far the rule is founded on substantial justice (c). But it is not precisely accurate to say, that the corroborative circumstances must be tantamount to another witness ; for they need not be such, as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose (d). Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness (e). Still, evidence confirmatory of the single accusing witness in some slight particulars only, will not be sufficient

(y) 39 & 40 Geo. 3, c. 39²² ; 1 & 2 Geo. 4, c. 24, § 2, Ir. ; 5 & 6 Vict. c. 51, § 1. Sect. 2 of this last act, makes it a high misdemeanor to discharge or aim fire-arms, or throw or use any offensive matter or weapon, with intent to injure or alarm Her Majesty.

(z) This is said to have been the opinion of Lord Tentarden ; 3 St. Ev. 860, n. (g) ; R. v. Champney, 2 Lew. C. C. 259, per Coleridge, J.

(a) See R. v. Lee, cited 2 Russ. C. & M. 650.

(b) 4 Bl. Com. 358 ; R. v. Gaynor, 1 Cr. & Dix, Ir. Cir. R. 142 ; Jebb, C. C. 262, S. C.

(c) R. v. Yates, C. & Marsh. 139, per Coleridge, J.

(d) R. v. Gardiner, 8 C. & P. 737, per Patteson, J. ; 2 Moo. C. C. 95, S. C.

(e) R. v. Mayhew, 6 C. & P. 315, per Lord Denman.

to warrant a conviction (*f*); but it must, at least, be strongly corroborative of his testimony (*g*); or, to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant" (*h*).

§ 698. When there are several assignments of perjury in the same indictment, it does not seem to be clearly settled, whether, in addition to the testimony of a single witness, there must be corroborative proof with respect to each; but the better opinion is that such proof is necessary; and *that* too, although all the perjuries assigned were committed at one time and place (*i*). For instance, if a person, on putting in his schedule in the Insolvent Debtor's Court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not it seems suffice, though it may be very difficult to obtain any fuller evidence (*k*).

§ 699. The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that *without any witness directly to disprove what is sworn, circumstances alone*, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. The principle is, that circumstances necessarily make a part of the proofs of human transactions; that such as have been reduced to writing in

(*f*) *R. v. Yates*, C. & Marsh. 139, per Coleridge, J.

(*g*) *R. v. Champney*, and *R. v. Wigley*, 2 Lew. C. C. 258, 259, n., per Coleridge, J.; *Woodbeck v. Keller*, 6 Cowen, 118, 121, per Sutherland, J.

(*h*) *R. v. Muscot*, 10 Mod. 194. See *The State v. Molier*, 1 Dev. 263, 265; *The State v. Hayward*, 1 Nott & M'Cord, 547; *Clark's Exors. v. Van Reimsdyk*, 9 Cranch, 160.

(*i*) *R. v. Virrier*, 12 A. & E. 324, per Lord Denman.

(*k*) *R. v. Parker*, C. & Marsh. 639, 645—647, per Tindal, C. J. In *R. v. Mudie*, 1 M. & Rob. 128, 129, Lord Tenterden, under similar circumstances, refused to stop the case, saying that if the defendant was convicted he might move for a new trial. He was however acquitted.

unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence aliunde; and that such as have not been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testimony. Accordingly it is now held, that a living witness of the *corpus delicti* may be dispensed with, and documentary or written evidence be relied upon, to convict of perjury,—*first*, where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, in cases where the matter, so sworn, is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; the oath only being proved to have been taken; and *thirdly*, in cases where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other writings, which are found in his possession, and have been treated by him as containing the evidence of the fact recited in them (l).

§ 700. If the evidence adduced in proof of the crime of perjury consists of *two opposing statements by the prisoner*, and nothing more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that that declaration was the truth, and the other an error, or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances, against him (m). And if both the contradictory statements were delivered under oath, there is still nothing to show

(l) U. S. v. Wood, 14 Peters, 430, 440—442. In this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandise, have been actually purchased," upon the evidence of the invoice-book of his father, John Wood of Saddleworth, Eng., and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the Government of the United States, by invoicing and entering the goods shipped at less than their actual cost. The whole of this case deserves an attentive perusal.

(m) See Alison's Prin. of Crim. Law of Scot. 481.

which of them is false, where no other evidence of the falsity is given (*n*). If, indeed, it can be shown that, before making the statement on which perjury is assigned, the accused had been *tampered* with (*o*), or if there be other circumstances in the case tending to prove that the statement offered as evidence against the prisoner was in fact true, a legal conviction may be obtained (*p*); and provided the nature of the statements was such, that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. It does not, however, of necessity follow, that, because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time (*q*). Moreover, when a man merely swears to the best of his

(*n*) *R. v. Wheatland*, 8 C. & P. 238, 241, per Gurney, B.; *R. v. Gaynor*, 1 Cr. & Dix, Ir. Cir. R. 142; *Jebb*, C. C. 262, S. C.; *R. v. Harris*, 5 B. & A. 926.

(*o*) *Anon.*, per Yates, J., Lord Mansfield, Wilmot and Aston, Js., concurring; 5 B. & A. 939, 940, note. See the observations of Mr. Greaves on this case, in 2 Russ. C. & M. 653, note.

(*p*) *R. v. Knill*, 5 B. & A. 929, 930, n.

(*q*) Per Holroyd, J., in *R. v. Jackson*, 1 Lew. C. C. 270. This very reasonable doctrine is in perfect accordance with the rule of the Criminal Law of Scotland, as laid down by Mr. Alison, in his excellent treatise on that subject, in the following terms:—"When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded, that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognised; but it is now justly considered indispensable, that the perjury should be specified as existing in one, and the other deposition referred to *in modum probationis*, to make out, along with other circumstances, where the truth really lay." See Alison's *Princip. of Crim. Law of Scot.* 176.

memory and belief, it necessarily requires very strong proof to show that he is wilfully perjured (*r*).

§ 701. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. Therefore, the holding of the Court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient were the prisoner charged with any other offence (*s*).

§ 702. In cases of *bastardy*, also, a man cannot be adjudged to be the putative father of an illegitimate child on the single testimony of the mother ; but, before an order of affiliation can be made by the petty sessions (*t*), or confirmed by the quarter sessions (*u*), the evidence of the mother must be corroborated, *in some material particular*, by other testimony, to the satisfaction of the justices ; and the order will be bad, if it does not allege that the confirmatory evidence was material (*x*). This rule has been wisely established, in order to protect men from accusations which profligate, designing, and interested women might easily make, and which, however false, it might be extremely difficult to disprove.

§ 703. The principles above stated, in regard to the proof of perjury, apply with equal force to the case of *an answer in Chancery*. Formerly, when a material fact was directly put in issue by the answer, the courts of equity followed the maxim of the Roman

(*r*) Per Tindal, C. J., in *R. v. Parker*, C. & Marsh. 645.

(*s*) 2 Russ. C. & M. 664 ; 2 Hawk. P. C. c. 46, § 10.

(*t*) 7 & 8 Vict. c. 101, § 3.

(*u*) 8 & 9 Vict. c. 10, § 6.

(*x*) *R. v. Read*, 9 A. & E. 619 ; 1 P. & D. 413, S. C. ; 8 & 9 Vict., c. 10, § 1, and Schedule, Nos. 7 & 8. In *R. v. Js. of Bucks*, 14 L. J. N. S. M. C. 45, it was held, that all the evidence must be given upon oath, and that this fact must appear on the face of the order ; but though the first point there ruled is still unquestionably the law, the second is no longer material, as the forms given in the Schedule of 8 & 9 Vict. c. 10, omit all mention of an oath, and § 1 of that act declares the forms to be valid.

law, *Responsio unius non omnino audiatur*, and required the evidence of two witnesses as the foundation of a decree. But of late years the rule has been referred more strictly to the equitable principle on which it is founded, namely, the right to equal credit with any other witness, which the defendant may claim in all cases, where his answer is "positively, clearly, and precisely" responsive to any matter recited in the bill. For the plaintiff, by calling on the defendant to answer an allegation which he makes, thereby admits the answer to be evidence (*y*). In such case, if the defendant in express terms negatives the allegations in the bill, and the bill is supported by the testimony of only a single witness, affirming what has been so denied, the Court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill (*z*). But the corroborating evidence of an additional witness, of a letter of the defendant (*a*), or of other circumstances, may give a turn either way to the balance. And, indeed, the evidence arising from circumstances alone, may be stronger than the testimony of any single witness (*b*).

§ 704. In the *ecclesiastical courts* the rule requiring a plurality of witnesses is carried far beyond the verge of common sense; and although no recent decision of those courts has, we believe, been pronounced, expressly determining that five, seven, or more witnesses are essential to constitute full proof, yet the authority of Dr. Ayliffe, who states that, according to the canon law, this amount of evidence is required in some matters, has been very lately cited with apparent assent, if not approbation, by the learned Sir Herbert Jenner Fust (*c*). The case in support of which the above high

(*y*) *Gressley Ev.* 4; *East India Co. v. Donald*, 9 Ves. 282—284.

(*z*) *Cooth v. Jackson*, 6 Ves. 40, per Lord Eldon; *Cooke v. Clayworth*, 18 Ves. 12.

(*a*) *Keys v. Williams*, 3 You. & Coll. Ex. R. 55; *Dawson v. Massey*, 1 Ball & Bea. 234; *Savage v. Brocksopp*, 18 Ves. 335.

(*b*) *Pember v. Mathers*, 1 Bro. Ch. R. 52; 2 Story on Eq. Juria., § 1528; *Gressley Ev.* 4; *Clark's Exors. v. Van Reimsdyk*, 9 Cranch, 160.

(*c*) *Evans v. Evans*, 1 Roberts. Ecc. R. 171. The passage cited from Ayliffe Par. 444, is as follows:—"Full proof is made by two or three witnesses at the least. For there are some matters which, according to the *canon law*, do require *five, seven, or more witnesses*, to make full proof." The same learned commentator, a little further on, after explaining that "*Liquid proof* is that which appears to the judge from the act of court; since that cannot properly be said to be

authority was quoted, was a suit for a divorce (*d*). In a previous action for criminal conversation, a special jury had given 500*l.* damages to the husband, who, accompanied by a *female* servant (*e*), had found his wife and the adulterer together in bed. This last act was deposed to by the servant; but as she was the only witness called to prove it, and as her testimony was uncorroborated, the learned judge did not feel himself at liberty to grant the promoter's prayer. This doctrine, that the testimony of a single witness, though *omni exceptione major*, is insufficient to support a decree in the ecclesiastical courts, when such testimony stands unsupported by *adiminicular* circumstances, has been frequently propounded by Lord Stowell, both in suits for divorce (*f*), for defamation (*g*), and for brawling (*h*); and, before the new Will Act was passed (*i*), Sir John Nicholl disregarded similar evidence, as not amounting to legal proof of a testamentary act (*k*). In the case, too, of *Mackenzie v. Yeo* (*l*), where a codicil was propounded, purporting to have been duly executed, and was deposed to by one attesting witness only, the other having married the legatee, Sir Herbert Jenner refused to grant probate, though he admitted the witness was

manifest or notorious," adds, "by the canon law a Jew is not admitted to give evidence against a Christian, especially if he be a clergyman; for by that law, the proofs against a clergyman ought to be made clearer than against a layman." Par. 448. Dr. Ayliffe does not mention what matters require this superabundant proof, but an able writer in the Law Review, (No. 2, p. 380, n.) tells us, that, in the case of a cardinal charged with incontinence, the *probatio*, in order to be *plena*, must be established by no less than *seven eye-witnesses*; so improbable does it appear to the church, that one of her highest dignitaries should be guilty of such an offence; and so anxious is she to avoid all possibility of judicial scandal. This is adopting with a vengeance the principles of David Hume with respect to miracles.

(*d*) *Evans v. Evans*, 1 Roberts. Ecc. R. 165.

(*e*) The fact that the witness was a woman, does not seem to have formed an element in the judgment of the Court, though Dr. Ayliffe assures his readers with becoming gravity that, "By the canon law, more credit is given to male than to female witnesses." Par. 545.

(*f*) *Donellan v. Donellan*, 2 Hagg. Ec. R. 144 (Suppl.) See also *Simmonds v. Simmonds*, 11 Jurist, 830, per Dr. Lushington.

(*g*) *Crompton v. Butler*, 1 Cons. R. 460.

(*h*) *Hutchins v. Denziloe*, 1 Cons. R. 181, 182.

(*i*) 7 Will. 4 & 1 Vict. c. 26, which by § 34, applies to wills made after the 1st of January, 1838.

(*k*) *Theakston v. Marson*, 4 Hagg. Ec. R. 313, 314.

(*l*) 3 Curteis, 125.

unexceptionable, on the ground that his testimony was not confirmed by adminicular circumstances, and that the probabilities of the case inclined against the factum of such an instrument. But in another case (*m*) the same learned judge admitted a paper to probate, on the testimony of one attesting witness, who had been examined a few days after the death of the testator, though the other witness, whose deposition had not been taken till two years and a half afterwards, declared that the will was not signed in his presence. In this case there was a formal attestation clause, and that fact was regarded by the Court as favouring the supposition of a due execution.

§ 705. Though the cases cited above certainly establish beyond dispute, that, by the canon law, as recognised in our spiritual courts, one uncorroborated witness is insufficient, they as certainly decide, that, in ordinary cases at least, two or more witnesses need not depose to the principal fact; but that it will suffice if one be called to swear to such fact, and the other or others speak merely to confirmatory circumstances. Nay, it would seem from some expressions used, that, as in cases of perjury, documentary or written testimony, or the statements or conduct of the party libelled, may supply the place of a second witness (*n*). Still, if proceedings be instituted under the provisions of some statute, which expressly enacts that the offence shall be proved by two lawful witnesses, as, for instance, the act of 5 & 6 Edw. 6, c. 4, which relates to brawling in a church or churchyard, the Court might feel some delicacy about presuming that such an enactment would be satisfied, by calling one witness to the fact and one to the circumstances (*o*). It seems that this rule of the canonists depends less on the authority of the civilians, than on the Mosaic code, which enacts, that one witness shall not rise up against a man

(*m*) *Gove v. Gawen*, 3 Curteis, 151.

(*n*) In *Kenrick v. Kenrick*, 4 Hagg. Ec. R. 114, the testimony of a single witness to adultery, being corroborated by evidence of the misconduct of the wife, was held to be sufficient; Sir John Nicholl distinctly stating, "that there need not be two witnesses; one witness, and circumstances in corroboration, are all that the law in these cases requires," pp. 136, 137; and Dr. Lushington, even admitting that "he was not prepared to say that one clear and unimpeached witness was insufficient," p. 130. See also 3 Burn. Eccl. L. 304.

(*o*) *Hutchins v. Denziloe*, 1 Cons. R. 182, per Lord Stowell.

for any iniquity, but at the mouth of two or three witnesses shall the matter be established (*p*). Indeed, the decretal of Pope Gregory the Ninth, which enforces the observance of this doctrine (*q*), expressly cites St. Paul as an authority, where he tells the Corinthians that “in ore duorum vel trium testium stat omne verbum” (*r*).

§ 706. Now, however well suited this rule might have been to the peculiar circumstances of the Jewish nation, who, like the Hindus of old, the modern Greeks, and other enslaved and oppressed people, entertained no very exalted notions on the subject of truth; and who, on one most remarkable occasion, gave conclusive proof that even the necessity for calling two witnesses was no valid protection against the crime of perjury (*s*); it may well be doubted whether, in the present civilised age, such a doctrine, instead of a protection, has not become an impediment to justice, and whether, as such, it should not be abrogated. That this was the opinion of the common law judges in far earlier times than the present, is apparent from several old decisions, which restrict the rule to causes of merely spiritual conusance, and determine, that all temporal matters which incidentally arise before the ecclesiastical courts may, and indeed must, be proved there, as elsewhere, by such evidence as the common law would allow (*t*). If, therefore, the spiritual courts refuse to admit proof of the payment or release of a legacy, or of plene administravit, by a single witness, the Court of Queen’s Bench will grant a prohibition.

§ 707. It remains only to mention the case of *accomplices*, who are usually interested, and always infamous witnesses, and whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice. The *degree of credit*, which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said, that they

(*p*) Deut. xix. 15; Deut. xvii. 6; Numb. xxxv. 30.

(*q*) Dec. Greg. lib. 2, tit. 20, cap. 23.

(*r*) 2 Cor. xiii. 1.

(*s*) St. Matthew, xxvi. 60, 61.

(*t*) *Richardson v. Desborough*, Ventr. 291; *Shotter v. Friend*, 2 Salk. 547; *Breedon v. Gill*, Lord Raym. 221. See further, 3 Burn. Eccl. L. 304—308; *Grant v. Gould*, 2 H. Bl. 101, per Lord Loughborough.

ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded, that the jury may, if they please, act upon the evidence of the accomplice, even in a capital case, without any confirmation of his statement (*u*). But, on the other hand, judges, in their discretion, will advise a jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be deemed a neglect of duty on the part of the judge (*x*). And considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner, excepting under very special circumstances, upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but only advise them not to give credit to the testimony.

§ 708. It has been stated, that this practice is not applicable to cases of *misdemeanor* (*y*); but there appears to be no foundation, either in reason or law, for such a distinction between misdemeanors and felonies; and, in fact, the distinction, if it ever existed, no longer prevails (*z*). The extent of corroboration will of course depend much upon the nature of the crime (*a*), and the degree of moral guilt attached to its commission; and if the offence be one of a purely legal character, as, for instance, the non-repair of a highway,—or if it imply no great moral delinquency, as the fact of having been present at a prize-fight, which unfortunately terminated in manslaughter (*b*),—the parties con-

(*u*) *R. v. Hastings*, 7 C. & P. 152, per Lord Denman; *R. v. Jones*, 2 Camp. 132, per Lord Ellenborough; 31 How. St. Tr. 315, S. C.; *R. v. Atwood*, 1 Lea. C. C. 464; *R. v. Durham*, ib. 478; *R. v. Dawber*, 3 Stark. R. 34; *R. v. Sheehan*, Jebb, C. C. 54; *R. v. Jarvis*, 2 M. & Rob. 40.

(*x*) *R. v. Barnard*, 1 C. & P. 88; *R. v. Wilkes*, 7 C. & P. 273.

(*y*) Per Gibbs, Att.-Gen. arg. in *R. v. Jones*, 31 How. St. Tr. 315.

(*z*) *R. v. Farler*, 8 C. & P. 106.

(*a*) *R. v. Jarvis*, 2 M. & Rob. 40, 42, per Gurney, B.

(*b*) *R. v. Hargrave*, 5 C. & P. 170, per Patteson, J.

cerned, though in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence.

§ 709. Though it is thus the settled practice to require other evidence in corroboration of that of an accomplice; yet the *manner and extent of the corroboration* required, are not so clearly defined. Some judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to the *corpus delicti* only; but others with more reason have thought it essential, that there should be corroborating proof that the *prisoner* actually participated in the offence; and when several prisoners are to be tried, that confirmation should be required as to all of them, before all can be safely convicted. This last is undoubtedly now the prevailing opinion; the confirmation of the witness, as to the commission of the crime, being considered no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but, on the contrary, may have every motive to declare the truth, if he intends to be believed when he shall afterwards fix the crime upon the prisoner (c).

§ 710. This doctrine has been well explained by the late Lord Abinger. "It is a practice," said his Lordship in a case of night-poaching (d), "which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the *identity of the party accused*. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a

(c) *R. v. Farler*, 8 C. & P. 106, per Lord Abinger; *R. v. Wilkes*, 7 C. & P. 272, per Alderson, B.; *R. v. Moores*, ib. 270; *R. v. Addis*, 6 C. & P. 388, per Patterson, J.; *R. v. Wells*, M. & M. 326, per Littledale, J.; *R. v. Sheehan*, Jebb, C. C. 54; *R. v. Carey*, id. 203.

(d) *R. v. Farler*, 8 C. & P. 107, 108.

knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. * * * The danger is, that when a man is fixed, and knows that his own guilt is detected, he will purchase impunity by falsely accusing others." If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there were but one (*e*). The testimony, too, of the wife of an accomplice will not be considered corroborative of the evidence of her husband (*f*).

§ 711. There is one class of persons, *apparently accomplices*, to whom the rule requiring corroborating evidence does not apply; namely, persons who have entered into communication with conspirators, but, either afterwards repenting, or having originally determined to frustrate the enterprise, have subsequently disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far advanced and matured as to insure their conviction and punishment. The early disclosure is considered as binding the party to his duty; and though a great degree of objection or disfavour may attach to him for the part he has acted as an *informer*, or on other accounts, yet his case is not treated as the case of an accomplice (*g*).

§ 712. We pass now to the consideration of those matters for the proof of which the law requires a *written document* more or less formally executed; and, *first, as to those transactions*, which, at *common law*, are required to be evidenced by deed. The most important of these relate to *incorporeal rights*; and it is now clearly determined, that all such rights, whether they amount to an interest in land or not, lie in *grant*, and as such, can neither

(*e*) *R. v. Noakes*, 5 C. & P. 326, per Littledale, J.; *R. v. Magill*, Ir. Cir. R. 418, per Perrin, J.

(*f*) *R. v. Neal*, 7 C. & P. 168, per Park, J.

(*g*) *R. v. Despard*, 28 How. St. Tr. 489, per Lord Ellenborough.

be created, nor assigned, nor surrendered, except by *deed* (*h*). The term "incorporeal rights" includes, among other things, advowsons, rents, interests in land not in possession, as remainders, or reversions for life or years, profits à prendre, easements, and the like; and the principle, which requires such rights to be evidenced by documents under seal, does not depend on the quality or amount of interest granted, transferred, or surrendered, but on the nature of the subject-matter; a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement or right in nature of an easement, can no more be granted or conveyed for life or for years or even for days without a deed, than in fee-simple (*i*). So strictly has this rule been interpreted, that even a ticket of admission to a theatre during a season, or to a grand-stand during the races, can afford no irrevocable title to the party purchasing it; but, after notice of revocation, he can be removed by the owner of the premises, without assigning any reason, and without so much as returning the price of the ticket; and his only remedy, if any, is to bring an action, founded on a breach of contract, against the person who sold the ticket, or against those who authorised its sale (*k*). It further deserves notice, that, while a mere personal license of pleasure, as the privilege of hunting, will be revocable, whether granted by parol, or under seal (*l*), the privileges of hunting, fishing, or shooting, if granted to a party and his assigns, and if coupled with a right of taking away the game when killed, will be profits à prendre, and as such may be, and can only be, irrevocably granted by deed (*m*).

(*h*) *Wood v. Leadbitter*, 13 M. & W. 842, 843; *Hewlins v. Shippam*, 5 B. & C. 239; Co. Lit. 337 b, 338 a; 2 Shepp. Touch. by Preston, p. 300; 1 Wms. Saund. 236 (a); *Lyon v. Reed*, 13 M. & W. 303—305; *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824, S. C.

(*i*) *Wood v. Leadbitter*, 13 M. & W. 843, per Alderson, B. See *Williams v. Morris*, 8 M. & W. 488.

(*l*) *Wood v. Leadbitter*, 13 M. & W. 838, 843—855; overruling *Taylor v. Waters*, 7 Taunt. 374; and explaining *Webb v. Paternoster*, Palmer, 71; Roll. 143, 152; *Noy*, 98; *Popham*, 151, and *Godbolt*, 282, S. C.; *Wood v. Lake*, Sayer, 3; and *Wood v. Manley*, 11 A. & E. 34; 3 P. & D. 5, S. C.

(*j*) *Wood v. Leadbitter*, 13 M. & W. 844, 845; *Wickham v. Hawker*, 7 M. & W. 79; *Thomas v. Sorrell*, Vaughan, 351.

(*m*) *Doe v. Lock*, 2 A. & E. 706; *Wickham v. Hawker*, 7 M. & W. 63,

§ 713. Although a parol demise of an incorporeal hereditament passes no estate, it by no means follows, that the party who actually occupies and enjoys the thing so demised, is protected from all liability to pay for his occupation and enjoyment; and the better opinion is, that the grantor will still be entitled to recover from the grantee, in a count for use and occupation, such reasonable sum as the jury shall assess, for the actual enjoyment of the hereditament demised (*n*).

§ 714. Another class of transactions, which, at common law, are in general required to be evidenced by deed, consists of contracts made, and acts done, by *corporations* (*o*). The general rule of law, that a corporation aggregate cannot express its will or do any act except under seal, may be traced to a remote antiquity, and is by no means a rule of a merely technical nature, but is founded on the reasonable assumption, that the concurrence of the whole body corporate in any particular act, can best be authenticated by the affixing of the corporate seal to the document relating to such act (*p*). In short, the common seal has been termed, in the quaint phraseology of olden times, "the hand and mouth of the corporation" (*q*). It is true, that this rule has, in the United States, been almost entirely superseded in practice (*r*); and in England it has also, from the earliest traceable periods, been subject to certain *exceptions*, which rest upon a principle of convenience, amounting almost to necessity (*s*), and relate either to *trivial matters of frequent recurrence*, or to *such affairs* as from

recognised in *Durham and Sunderland Rail. Co. v. Walker*, 2 Q. B. 967; *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824, S. C.

(*n*) *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824; 4 N. & M. 506, S. C.; *Thomas v. Fredericks*, ~~Q. B. 1. 1847~~, not yet reported. See post, §§ 717, 750, 756, 757.

(*o*) *Arnold v. Mayor of Poole*, 4 M. & Gr. 860; *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Church v. Imp. Gas Light and Coke Co.*, 6 A. & E. 861.

(*p*) *Mayor of Ludlow v. Charlton*, 6 M. & W. 823, per Rolfe, B.; *Church v. Imp. Gas Light and Coke Co.*, 6 A. & E. 861.

(*q*) *R. v. Bigg*, 3 P. Wms. 423, cited by Tindal, C. J., in *Gibson v. East India Co.*, 5 Bing. N. C. 269.

(*r*) *Beverley v. Lincoln Gas Light and Coke Co.*, 6 A. & E. 837, 838, per Patteson, J.

(*s*) *Church v. Imp. Gas Light and Coke Co.*, 6 A. & E. 861, per Lord Denman, cited by Rolfe, B., in *Mayor of Ludlow v. Charlton*, 6 M. & W. 822.

their nature *do not admit of delay* (t). Thus, to borrow the language of Mr. Baron Rolfe, in a well-considered case (u), "A corporation, it is said, which has a *head*, may give a personal command, and do small acts; as it may retain a servant. It may authorise another to drive away cattle damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters, the head of the corporation seems, from the earliest times, to have been considered as delegated by the rest of the members to act for them."

§ 715. His Lordship then proceeds to point out, that (x) "in modern times, a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by act of Parliament, for the purpose of carrying on *trading speculations*; and where the nature of their constitution has been such as to render the *drawing of bills*, or the *constant making of any particular sort of contracts necessary for the purposes of the corporation*, there the Courts have held that they would imply in those, who are, according to the provisions of the Charter or act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist." In accordance with the rule thus expounded, it has been held, that assumpsit will lie against a gas company, for meters sold to them, and a like action is maintainable by them against the consumer, either for not accepting gas according to his agreement, or for the price of gas supplied to him (y). But, on the other hand, a contract with a water company for the supply of iron pipes, is not one of such frequent occurrence, or of so small

(t) *Arnold v. Mayor of Poole*, 4 M. & Gr. 895, per Tindal, C. J.; *De Grave v. Mayor of Monmouth*, 4 C. & P. 111.

(u) *Mayor of Ludlow v. Charlton*, 6 M. & W. 821.

(x) *Id.*

(y) *Beverley v. Lincoln Gas Light and Coke Co.*, 6 A. & E. 829; 2 N. & P. 283, S. C.; *Church v. Imp. Gas Light and Coke Co.*, 6 A. & E. 846; 3 N. & P. 35, S. C.; *City of London Gas Light and Coke Co. v. Nicholls*, 2 C. & P. 365.

importance, as to be taken out of the general rule, which requires the contracts of corporations to be under seal (*z*); and even before the East India Company ceased to be merchants, it was held, that the allowance by them of a retiring pension to a military officer could not be enforced in a court of law, unless it were granted by deed (*a*).

§ 716. The rule requiring corporations to act by deed will not protect them, either from an action of trover, where goods have been wrongfully taken by their agent (*b*), or from an action of assumpsit for money had and received, where they have wrongfully possessed themselves of money belonging to the plaintiff (*c*). This exception rests on necessity; for, as a corporation would scarcely put their seal to a promise to return moneys wrongfully received by them, it follows that if a seal were necessary, the injured party would be without remedy.

§ 717. In the application of the above rule, and its exceptions, the question has often been discussed, as to how far a distinction could be recognised between *executed* and *executory* contracts (*d*); but it seems now to be finally determined; first, that where the contract falls within one of the exceptions, and consequently, need not be under seal, the corporation may equally sue or be sued upon the parol agreement, whether it be executed, or be merely executory (*e*); secondly, that where a parol contract, which should have been under seal, has been *executed* on the part of the corporation before action brought, so that the other contracting parties have received the whole benefit of the consideration for which they bargained, the corporation will be entitled to sue on such

(*z*) *Church v. Imp. Gas Light and Coke Co.*, 6 A. & E. 860—862, per Lord Denman, explaining *East London Wat. W. Co. v. Bailey*, 4 Bing. 283; 12 Moore, 532, S. C.

(*a*) *Gibson v. East India Co.*, 5 Bing. N. C. 262; 7 Scott, 74, S. C.

(*b*) *Yarborough v. Bank of England*, 16 East, 6.

(*c*) *Hall v. Mayor of Swansea*, 5 Q. B. 526.

(*d*) See ante, § 713, post, §§ 750, 756, 757.

(*e*) *Church v. Imp. Gas Light and Coke Co.*, 6 A. & E. 846; 3 N. & P. 35, S. C.; recognised in *Gibson v. East India Co.*, 5 Bing. N. C. 271, and in *Arnold v. Mayor of Poole*, 4 M. & Gr. 895.

contract, and their opponents will be bound thereby (e); but, thirdly, although a corporation may sue on a parol contract which has been executed on their part, they cannot be sued on such contract, when executed on the part of their adversaries, unless it fall within one of the above exceptions. Thus, where an attorney, who had been appointed, but not under seal, by the mayor and town council of a borough to conduct suits, brought an action against the corporation for his costs, it was held that he could not recover (f); and so, where the tenant of a municipal corporation had, under a parol agreement, laid out large sums of money in improving his estate, which he was to be allowed to deduct from his rent, the Court held, that, an action having been brought against him for the rent, he was not entitled to set off these sums, as he had failed to procure the assent of the corporation under seal (g). Whether this distinction between the rights and liabilities of corporations on their parol executed contracts, is consistent with sound principles of justice, may admit of some doubt. (h).

§ 718. Again, in order to authorise an *agent* to execute a deed for his principal, the authority must be given by an instrument under seal (i); and as such an instrument, or power of attorney, *transfers* no interest, the agent or attorney being merely put thereby in the place of the principal, it follows that the deed must be executed by the agent in the name, and as the act, of him who gave the power (k). Neither can a parol ratification by the principal of a deed executed by his agent, give validity to the deed, when the agent has not been authorised to act by an instrument under seal (l); and it seems that evidence of the implied, if not of the

(e) *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 131, 193—196; 6 Scott, N. R. 68, S. C.; *Mayor of Stafford v. Till*, 4 Bing. 77; 12 J. B. Moore, 260, S. C.; *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466; *Southwark Bridge Co. v. Sills*, 2 C. & P. 371, per Best, C. J.

(f) *Arnold v. Mayor of Poole*, 4 M. & Gr. 860.

(g) *Mayor of Ludlow v. Charlton*, 6 M. & W. 815.

(h) See observations of Patteson, J., in *Beverley v. Lincoln Gas Light and Coke Co.*, 6 A. & E. 838—842; and compare them with the judgment of Tindal, C. J., in *Arnold v. Mayor of Poole*, 4 M. & Gr. 896.

(i) *Berkeley v. Hardy*, 5 B. & C. 355; 8 D. & Ry. 102, S. C.; *White v. Cuyler*, 6 T. R. 176; *Steiglitz v. Eginton*, Holt, N. P. R. 141; *Williams v. Walsby*, 4 Esp. 220; *Callaghan v. Pepper*, 2 Ir. Eq. R. 399.

(k) *Hunter v. Parker*, 7 M & W. 343, per Parke, B.

(l) *Id.*

express, recognition or adoption of the deed by the principal, will not, even as against him, raise a presumption that the agent was thus formally authorised to act, so as to dispense with the necessity of proving that fact (*m*).

§ 719. Proceeding next to a consideration of the documentary evidence which is rendered necessary by *statute law*, the first act to which we shall refer is the Companies Clauses Consolidation Act, 1845 (*n*). This statute enacts, in § 14, that, subject to the regulations therein and in the special Act contained, every shareholder in any company, to which the provisions of the general Act apply, may sell and transfer his shares in the undertaking, or his interest in the capital stock of the company; but every such *transfer* shall be by *deed* duly stamped, in which the consideration shall be duly stated; and such deed may be according to the form stated below (*o*), or to the like effect.

§ 720. The next transaction, which we propose to notice is the *sale of a ship*. The act which regulates these sales is 8 & 9 Vict. c. 89, which, in § 34, enacts, that, whenever the property in any ship or vessel, or any part thereof, belonging to any of Her Majesty's subjects, shall, after registry, be sold to any other or others of Her Majesty's subjects, it shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid for any purpose either in law or equity; provided that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing

(*m*) Lord Gosford v. Robb, 8 Ir. Law R. 217.

(*n*) 8 & 9 Vict. c. 16.

(*o*) "I —, of —, in consideration of the sum of —, paid to me by —, of —, do hereby transfer to the said —, — share [*or* shares] numbered — in the undertaking called 'The — Company' [*or* — pounds consolidated stock in the undertaking called 'The — Company,' standing (*or* part of the stock standing) in my name in the books of the Company], to hold unto the said —, his executors, administrators, and assigns [*or* successors and assigns], subject to the several conditions on which I held the same at the time of the execution hereof; and I the said — hereby agree to take the said share [*or* shares] [*or* stock], subject to the same conditions. As witness our hands and seals the — day of —."

certificate, if the identity of the ship or vessel intended in the recital, be effectually proved thereby (o). It will be observed that this act does not necessarily require a bill of sale, an instrument

(o) § 37 enacts, "that no bill of sale or other instrument in writing shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector and comptroller of the port at which such ship or vessel is already registered, or to the collector and comptroller of any other port at which she is about to be registered de novo, as the case may be, nor until such collector and comptroller respectively shall have entered in the book of such last registry in the one case, or in the book of such registry de novo, after all the requisites of law for such registry de novo shall have been duly complied with, in the other case, (and which they are respectively hereby required to do upon the production of the bill of sale or other instrument for that purpose,) the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it; and further, if such ship or vessel is not about to be registered de novo, the collector and comptroller of the port where such ship is registered shall, and they are hereby required to, endorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following: (videlicet)—

‘Custom House, [*Port and date.*]

‘[*Name, residence, and description of vendor or mortgagor*] has transferred by [*bill of sale or other instrument*], dated [*date, number of shares*] to [*name, residence, and description of purchaser or mortgagee*].

‘A. B., Collector,

‘C. D., Comptroller.’

And forthwith to give notice thereof to the Commissioners of Customs; and in case the collector and comptroller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then the said collector and comptroller are hereby required to certify by endorsement upon the bill of sale or other instrument that the particulars before mentioned have been so entered in the book of registry, and endorsed upon the certificate of registry as aforesaid."

§ 38 enacts, "that when and so soon as the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale or other instrument shall be valid and effectual to pass the property thereby intended to be transferred as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees, who shall first procure the endorsement to be made upon the certificate of registry of such ship or vessel in manner hereinafter mentioned." See § 39.

in writing reciting the certificate of registry being enough; nor does it require such instrument to bear the signature of the party conveying; and therefore, provided the certificate of registry be duly recited, a ship may be transferred by an agent, by a mere note in writing describing him as such, though not signed by the agent for the principal, or even without referring to his character of agent at all (*p*). Indeed, in one case, where an auctioneer had sold a ship by an instrument *under seal*, but, inasmuch as he had only a parol authority from the owner to sell, and had, moreover, executed the instrument in his own name, it clearly could not be treated as the deed of the principal; the Court held that the addition of the seal had merely the effect of rendering the auctioneer liable to an action on his express covenant, and that the instrument might still be regarded as a written transfer of the ship by the principal, sufficient to satisfy the statute (*q*). Similar documentary evidence of the transfer of a ship is required by the statutes of the United States (*r*); and the better opinion seems to be, that, even by the law of nations, a written instrument of transfer is necessary, and that without this and the usual documents, no national character can be attached to the vessel (*s*).

§ 721. The Act to simplify the transfer of property (*t*) next requires a passing notice; for although that statute was extremely short lived, it having been repealed within a year from its passing (*u*), it has rendered a *deed* necessary in all cases of partitions, exchanges, assignments, or surrenders in writing, of freehold or leasehold lands, or of leases in writing of freehold, copyhold, or leasehold lands (*v*), provided the transfer has been effected between the 1st of January (*w*) and the 1st of October (*x*), 1845.

(*p*) Per Parke, B., in *Hunter v. Parker*, 7 M. & W. 343, 344.

(*q*) *Hunter v. Parker*, 7 M. & W. 322, 342—344. This case was decided on the repealed act of 3 & 4 Will. 4, c. 55, § 31, which entirely corresponds with § 34 of 8 & 9 Vict. c. 89, stated above.

(*r*) U. S. Navig. Act of 1792, ch. 45, § 14; Stat. 1793, ch. 52; Abbott on Ship. by Story, p. 45, n. (2); 3 Kent, Com. 143, 149.

(*s*) Abbott on Ship. by Story, p. 1, n. (1), and cases there cited; id. p. 27, n. (1); id. p. 45, n. (2); *Ohl v. Eagle Ins. Co.*, 4 Mason, 172; *Jacobsen's Sea Laws*, li. 1, ch. 2, p. 17.

(*u*) By 8 & 9 Vict. c. 106.

(*w*) Id., § 13.

(*t*) 7 & 8 Vict. c. 76.

(*v*) 7 & 8 Vict. c. 76, §§ 3 & 4. *Hunt & Russell*

(*x*) 8 & 9 Vict. c. 106, § 1. *16th Nov 307*

§ 722. This Act was succeeded by 8 & 9 Vict. c. 106, which enacts in § 2, "that, after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery;" or, in other words, shall pass by the delivery of the deed of conveyance, in the same manner as incorporeal hereditaments have heretofore passed. Section 3 of this statute further enacts, "that a *feoffment*, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a *partition* and an *exchange* of any tenements or hereditaments not being copyhold,—and a *lease*, required by law to be in writing, of any tenements or hereditaments,—and an *assignment of a chattel interest*, not being copyhold, in any tenements or hereditaments,—and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st of October, 1845, shall also be *void at law*, unless made by *deed*: Provided always that the said enactment, so far as the same relates to a release (y) or a surrender, shall not extend to Ireland."

§ 723. This last enactment, so far as it relates to feoffments, partitions, exchanges, assignments, and surrenders, is of little practical importance, since before the passing of the Act, such transfers were almost invariably effected by deed. With respect, however, to *leases*, the statute will prove highly beneficial; for by requiring all demises for a period exceeding three years to be under seal, it will gradually diminish, and at last dry up, that fruitful source of litigation, which sprung from the difficulty of distinguishing between an actual lease and an agreement for a lease under the old law. In future, if the instrument be not under seal, it will operate only as an agreement for a lease; that is, the party in possession of land under it will be a mere tenant at will, liable to become a tenant from year to year by the payment and acceptance of rent (z).

(y) This is obviously a misprint for "lease."

(z) See further as to the operation of this Act, Davidson, Concise Prec. of Convey. 50—71; Platt on Leases, *passim*. See also, post, § 725.

§ 724. Bearing in mind the alterations effected by the Acts just mentioned, we now come to the *Statute of Frauds*, passed in the reign of Charles II., the provisions of which Act have been extended to Ireland by 7 Will. 3, c. 12, and have also been enacted, generally in the same words, in nearly all the United States (*t*). This celebrated statute we owe to the great lawyer, but indifferent statesman, Lord Nottingham, who appears to have been assisted in framing it by Sir Leoline Jenkins and Lord Hale (*u*); yet notwithstanding these bright names, it is certainly drawn in so inartificial a manner as to confer little credit on the skill of the draftsmen; and if Lord Nottingham was justified, while speaking with parental pride of the principle of the measure, in declaring that it was an act, every line of which was worth a subsidy (*x*),—the present generation, who can contemplate the almost endless litigation which its ambiguous language has caused, may add with more truth, if not with more sincerity, that every line of it has cost a subsidy. The blame, however, which we do not hesitate to cast on the wording of the act, must be converted into unqualified praise, if we turn to regard the objects which it seeks to effect, and which it has, in fact, to a great extent effected (*y*). We shall then see that the rules of evidence, which it contains, are admirably calculated for the exclusion of perjury, by requiring, in the cases therein mentioned, some more satisfactory and convincing testimony than mere oral evidence affords. The statute dispenses with no proof of consideration, which was previously required, and gives no efficacy to written contracts, which they did not previously possess (*z*). Its policy is, to impose such requisites upon private transfers of property, as, without being hindrances to fair transactions, may either be totally inconsistent with dishonest projects,

(*t*) 29 Car. 2, c. 3; 4 Kent, Comm. 95, and note (*b*), (4th ed.) The Civil Code of Louisiana, art. 2415, without adopting in terms the provisions of the Statute of Frauds, declares generally, that all verbal sales of immovable property, or slaves, shall be void. 4 Kent, Comm. 450, note (*a*), (4th ed.)

(*u*) 3 Campbell's Lives of the Chancellors, 418.

(*x*) R. North's Life of Guildford, 209.

(*y*) In *Doe v. Harris*, 8 A. & E. 12, Lord Denman speaks of the Statute of Frauds, as "one of the wisest laws in principle, though far from being complete in its details, or fortunate in its execution."

(*z*) 2 St. Ev. 472; *Rann v. Hughes*, 7 T. R. 350, n.; *Barrell v. Trussell* 4 Taunt. 121.

or may tend to multiply the chances of detection (a). The object of the present work will not admit of an extended consideration of the provisions of this statute; but will necessarily restrict us to a notice of the rules of evidence, which it has introduced.

(a) Roberts on Frauds, Pref. xxii. This statute introduced no new principle into the law; it was new in England, only, in the mode of proof which it required. Some protective regulations of the same nature may be found in the early codes of most of the Northern nations, as well as in the laws of the Anglo-Saxon princes; the prevention of frauds and perjuries being sought, agreeably to the simplicity of those unlettered times, by requiring a certain number of witnesses to a valid sale, and sometimes by restricting such sales to particular places. In the Anglo-Saxon laws, such regulations were quite familiar; and the Statute of Frauds was merely the revival of obsolete provisions, demanded by the circumstances of the times, and adapted, in a new mode of proof, to the improved condition and habits of the trading community. By the Laws of Lotharius and Edric, Kings of Kent, § 16, if a Kentish man purchased anything in London, it must be done in the presence of two or three good citizens, or of the mayor of the city. (Cancian, *Leges Barbarorum Antiquæ*, Vol. iv., p. 231.) The laws of King Edward the Elder (*De jure et lite*, § 1,) required the testimony of the mayor, or some other credible person, to every sale, and prohibited all sales out of the city. (Cancian. ub. sup. p. 256.) King Athelstan prohibited sales in the country, above the value of xx. pence; and for those in the city, he required the same formalities as in the laws of Edward. (Ib. p. 261, 262, LL. Athelstani, § 12.) By the laws of King Ethelred, every freeman was required to have his surety, (*fidejussor*), without whom, as well as other evidence, there could be no valid sale or barter. "*Nullus homo faciat alterutrum, nec emat, nec permutet, nisi fidejussorem habeat, et testimonium.*" (Ib. p. 287, LL. Ethelredi, § § 1, 4.) In the Concilium Seculare of Canute, § 22, it was provided that there should be no sale, above the value of four pence, whether in the city or country, without the presence of four witnesses. (Ib. p. 305.) The same rule, in nearly the same words, was enacted by William the Conqueror. (Ib. p. 357, LL. Gul. Conq. § 43.) Afterwards, in the Charter of the Conqueror, (§ 60,) no cattle, ("*nulla viva pecunia*," scil. animalia,) could be legally sold, unless in the cities, and in the presence of three witnesses. (Cancian. ub. sup. p. 360, *Leges Anglo-Saxonicæ*, p. 198, note (o). Among the ancient Sueones and Goths, no sale was originally permitted, but in the presence of witnesses, and (*per mediatores*), through the medium of brokers. The witnesses were required, in order to preserve the evidence of the sale; and the brokers or mediators, (*ut pretium moderarentur*), to prevent extortion, and to see to the title. But these formalities were afterwards dispensed with, except in the sale of articles of value, (*res pretiosæ*), or of great amount. (Cancian. ub. sup. p. 231, n. 4.) Alienations of lands were made only (*publicis literis*) by documents legally authenticated. By the Danish law, lands in the city or country might be exchanged, without judicial appraisement, (*per tabulas manu signoque permutantis affixas*), by deed under the hand and seal of the party. (Ib. p. 261, n. 4.)

The Roman law required written evidence in a great variety of cases, embracing, among many others, all those mentioned in the Statute of Frauds; which are enumerated by N. De Lescut, *De Exam. Testium*, cap. 26. (Farinac. Oper.

§ 725. By this statute, all *leases*, estates, and interests in lands whether of freehold or for terms of years, and whether certain or uncertain, which, prior to the 1st of January, 1845 (*b*), have been created by livery and seisin only, that is, by mere matter in pais, without deed (*c*), or by parol, and not put in writing, and signed by the parties creating the same, or their agents duly authorised in writing, are allowed only the force and effect of estates at will; except leases not exceeding the term of three years from the making thereof, whereon the rent reserved shall amount to two-thirds of the improved value (*d*). It seems to be now determined,

Tom. ii., App. p. 243.) See also Brederodii Repertorium Juris, col. 984, *verb. Scriptura*. Similar provisions, extending in some cases even to the proof of payment of debts, were enacted in the statutes of Bologna, (A. D. 1454,) Milan, (1498,) and Naples, which are prefixed to Danty's *Traité de la Preuve par Témoins*. By a Perpetual Edict in the Archduchy of Flanders, (A. D. 1611,) all sales, testaments and contracts whatever, above the value of three hundred livres Artois, were required to be in writing. And in France, by the *Ordonnance de Moulins*, (A. D. 1566,) confirmed by that of 1667, parol or verbal evidence was excluded in all cases, where the subject-matter exceeded the value of one hundred livres. See Danty, *de la Preuve*, &c., *passim*; 7 Poth. *Œuvres*, &c., 4to, p. 56, *Traité de la Procéd. Civ.* ch. 3, art. 4, *Règle 3me.*; 1 Poth. on Obl. Part. 4, ch. 2, art. 1, 2, 3, 5; Commercial Code of France, Art. 109. The dates of these regulations, and of the Statute of Frauds, and the countries in which they were adopted, are strikingly indicative of the revival and progress of commerce. Among the Jews, lands were conveyed by deed only, from a very early period, as is evident from the transaction mentioned in Jer. xxxii. 10, 11, 12; where the principal document was "sealed according to the law and custom," in the presence of witnesses, and another writing, or "open evidence," was also taken, probably, as Sir John Chardin thought, for common use, as is the manner in the East at this day.

(*b*) When 7 & 8 Vict. c. 76, came into operation. See ante, § 721.

(*c*) See per Patteson, J., and Lord Denman, in *Cooch v. Goodman*, 2 Q. B. 592, 597.

(*d*) 29 Car. 2, c. 3, § 1, enacts, that "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding." § 2 "excepts, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two-third parts at the least of the full improved value of the thing demised." These provisions are enacted in § 1 of 7 Will. 3, c. 12, Ir.

though the point is not wholly free from doubt, that the above provisions of the statute are not applicable to *demises under seal* (e); and consequently, that an indenture of lease for more than three years need not be signed. It has been said more than once, that the tenancy described in the statute as "*an estate at will*," must be construed as a tenancy from year to year (f); but this is not strictly accurate; since a party who enters under an agreement void by the statute, is, in point of law, tenant at will for the first year, though, like any other tenant at will, he will be converted into a tenant from year to year, as soon as a yearly rent has been paid and accepted (g). In both characters, too, he will be subject to such of the terms of the agreement, as are not inconsistent with the species of tenancy, which the law, under the circumstances, creates (h); and, therefore, if one of the terms be that the tenant shall keep the premises in repair during his occupation, he will be liable to an action for breach of this term, notwithstanding the agreement is made void by the statute (i).

§ 726. Although a parol lease for a longer period than the Act permits is inoperative as to its duration, still if a tenant holds under it during the entire period, he may quit *without notice* at the expiration of the term. Let us illustrate this proposition by an example. Suppose a parol lease was granted for five years and a half, commencing at Michaelmas, 1842, at a specified rent. The tenant entered, and till Michaelmas, 1843, was a mere tenant at will. He then paid his rent, and continued in possession, and thereby became tenant from year to year until Michaelmas, 1847, capable of quitting, or liable to be ejected, on giving or receiving a six months' notice that would expire on the 29th of September in any year. At Lady-day, 1848, however, when the whole period of

(e) *Aveline v. Whisson*, 4 M. & Gr. 801; *Shep. Touchstone* by Preston, p. 56, n. (24); *Cooch v. Goodman*, 2 Q. B. 580, 597, 598; 2 G. & D. 159, S. C.; *Contra* 2 Bl. Com. 306.

(f) *Clayton v. Blakey*, 8 T. R. 3, per Lord Kenyon; *Berrey v. Lindley*, 3 M. & Gr. 512, per Coltman, J.; *id.* 514, per Maule, J.

(g) *Richardson v. Gifford*, 1 A. & E. 56, per Parke, J.; 3 M. & Gr. 512, n. (a) by reporter, and cases there cited; 2 Smith's Lead. C. 74—76.

(h) *Berrey v. Lindley*, 3 M. & Gr. 514, per Maule, J.; *Doe v. Bell*, 5 T. R. 471.

(i) *Richardson v. Gifford*, 1 A. & E. 52; 8 D. & R. 643, S. C. See *Beale v. Sanders*, 3 Bing. N. C. 850; 5 Scott, 68, S. C.

five years and a half will have run out, either party will be at liberty to terminate the tenancy without any notice whatever (*k*). The term of three years, for which a parol lease may be good, must be computed from the date of the agreement; and a term of three years to commence in futuro, will, consequently, not satisfy the statute (*l*). If a parol lease is made to hold from year to year, during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it (*m*).

§ 727. By the *third* section of the same statute (*n*), no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, in messuages, manors, lands, tenements, or hereditaments, could, prior to the 1st of January, 1845 (*o*), be *assigned, granted, or surrendered*, unless by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or his agent authorised by writing, or by act and operation of law. At common law, surrenders of estates for life or years in possession in things corporeal were good, though made by parol; but things incorporeal, as advowsons, rents, and the like, and interests in lands not in possession, as remainders and reversions for life or years, lying *in grant*, could not, and still cannot, be surrendered but by deed (*p*). The effect of this section is not to dispense with any evidence, required by the common law; but to add to its provisions somewhat of security, by requiring a new

(*k*) *Berrey v. Lindley*, 3 M. & Gr. 498, 511, 513, 514; *Doe v. Stratton*, 4 Bing. 446; 1 M. & P. 183, S. C.

(*l*) *Rawlins v. Turner*, 1 Lord Raym. 736.

(*m*) *Roberts on Frauds*, 241—244.

(*n*) See also 7 Will. 3, c. 12, § 1, Ir. to the like effect.

(*o*) When 7 & 8 Vict. c. 76, came into operation. See ante, §§ 721—723.

(*p*) Co. Lit. 337 b, 338 a; 2 Shep. Touchstone by Preston, p. 300; 1 Wms. Saund. 236 (a); *Lyon v. Reed*, 13 M. & W. 303—305; ante, § 712.

and more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this Act; but with respect to lands and tenements in possession, which, before the statute, might have been surrendered by parol, that is, by words only, some note in writing, duly signed, was by the statute made essential to a valid surrender in fact (*p*). In interpreting this section, it will be observed, that it does not contain, like the first two sections of the Act, any exception in favour of leases not exceeding the term of three years; and, consequently, it has been held to exclude alike parol assignments and parol surrenders of mere leases from year to year, though such leases have been created by verbal agreement (*q*). It seems, also, that a parol agreement by a lessee for the transfer of his interest, in a term not exceeding three years, which is invalid as an *assignment*, cannot operate as an *underlease* (*r*).

§ 728. The *surrender by act and operation of law*, mentioned in the statute, is a phrase to which it is difficult to assign a precise meaning. Its most obvious application is "to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the

(*p*) Roberts on Frauds, 248.

(*q*) Botting v. Martin, 1 Camp. 319, per M'Donald, C. B. : Mollett v. Brayne, 2 Camp. 103, per Lord Ellenborough; Thomson v. Wilson, 2 Stark. R. 379, per id. See Doe v. Wells, 10 A. & E. 435—437.

(*r*) Barrett v. Rolfe, 14 M. & W. 348, questioning Poultney v. Holmes, 1 Stra. 405.

remainder-man; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent, issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor" (s). In all these cases there can be no question of *intention*. The surrender is not the result of intention. It is the act of the law, and takes place independent, and even in spite, of intention the most express (t).

§ 729. Neither is it in any way material, whether the interest taken by the surrenderor under the new arrangement, be or be not equivalent to that which he enjoyed under the surrendered term; and, therefore, if a lessee for life, or for a long term of years, accepts from his landlord a new tenancy from year to year, or even a tenancy at will, this will amount to a surrender of his original lease (u). If, indeed, the new lease is *void*, its acceptance by the tenant cannot be construed into an implied surrender of his former interest, because, as it creates no new estate whatever, it of course can create none inconsistent with such interest (x). But the acceptance of a *voidable* lease amounts to a surrender of the former term, because ab initio it passes an interest, though that interest is liable to be defeated at some future period (y). Whether if a tenant accepts a new lease by parol for more than three years, he will thereby be held to have surrendered his former term, may, perhaps, be doubtful; but though the negative of this proposition has been urged by high authority, on the ground that the second lease does not pass an interest

(s) *Lyon v. Reed*, 13 M. & W. 306, per Parke, B. (t) *Id.* 306, 307, per *id.*

(u) *Mellow v. May*, Moore, 636; recognised by Holroyd, J., in *Hamerton v. Stead*, 3 B. & C. 482, 483, and by Lefroy, B., in *Lynch v. Lynch*, 6 Ir. Law R. 142; 1 Wms. Saund. 236 c.

(x) *Roe v. Archbishop of York*, 6 East, 86, explained by Abbott, C. J., in *Hamerton v. Stead*, 3 B. & C. 481, 482; *Lynch v. Lynch*, 6 Ir. Law R. 142, per Lefroy, B.; *Wilson v. Sewell*, 4 Burr. 1980; *Davison v. Stanley*, *id.* 2213, per Lord Mansfield.

(y) *Roe v. Archbishop of York*, 6 East, 102; *Doe v. Bridges*, 1 B. & Ad. 847, 856; *Fulmerston v. Steward*, Plowd. 107 (a), per Bromley, C. J.; Co. Lit. 45 (a); *Lloyd v. Gregory*, Cro. Car. 501; *Whitley v. Gough*, Dyer, 140—146.

according to the contract and intention of the parties (z),—yet it is submitted, that, as such lease is not void *ab initio*, but merely operates as a tenancy at will, the party receiving it would be estopped from disputing its effects as a surrender.

§ 730. It has been stated by Lord Mansfield, that even an *express* surrender in consideration of a new lease, will not be binding, if such lease be absolutely *void*, because the cause, ground, and condition of the surrender fail (a); but this doctrine has been qualified, if not shaken, by a recent case, where an old lease, so surrendered, was held not to be revived by the discovery that the new lease was invalid, the tenant having *actually occupied* the premises for some years under the new lease, and having paid rent according to its terms to successive tenants for life (b). Though this last point may, perhaps, still admit of argument, especially if there be anything like fraud or deception in the transaction, it is quite clear that a former term, surrendered *in fact*, in consideration of a mere *voidable* lease, will not, on the avoidance of such lease, be revived (c).

§ 731. Again, the mere entering into an agreement to *purchase* the estate by a tenant, will not work a surrender of his tenancy by operation of law; because there is an implied condition in such a contract, that the landlord should make out a good title; and it would be most unreasonable to suppose, that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not (d). If, however, from the peculiar wording of the agreement, it could fairly be inferred that the tenant, from its date, was to be absolutely a debtor for the purchase-money, paying interest upon it, and to cease to pay rent, a tenancy at will would probably be created after that time; and the acceptance of such new demise would then operate as a surrender of the former interest (e). So, an

(z) 1 Wms. Saund. 236, c.

(a) Zouch v. Parsons, 3 Burr. 1807.

(b) Doe v. Forwood, 3 Q. B. 627. See Thomas v. Fredericks, Q. B. T. T. 1847, 16 L. J. Q. B. 393, not yet reported.

(c) Doe v. Bridges, 1 B. & Ad. 847, 860.

(d) Doe v. Stanion, 1 M. & W. 695, 701; Tarte v. Darby, 15 M. & W. 601.

(e) 1 M. & W. 701.

agreement between a landlord and tenant during the existence of a lease, that the former should lay out money on the premises, and the latter pay an additional rent in consequence, does not create a new tenancy at an increased rent, so as to amount to a surrender of the old lease by operation of law (*f*). So, the mere *cancellation* of a lease cannot work a surrender by operation of law, to divest the tenant's estate, because the intent of the statute is, to take away the mode of transferring interests in lands by symbols and words only, as formerly used; and therefore, a surrender by cancellation, which is but a sign, is also taken away at law; though a symbolical surrender may perhaps be still recognized in Chancery, as the basis of relief (*g*). It would seem that this rule equally applies, whether the cancelled deed relates to things lying in livery, or to those which lie only in grant (*h*). Neither will the fact of the deed being found cancelled in the possession of the lessor, furnish in itself any presumption of an actual surrender by deed or note in writing; though it may be a circumstance fit for the consideration of the jury, if coupled with proof that the lessee has been out of possession for a series of years, or that the lessor's papers have been destroyed, or that other occurrences have happened, which might account for, or excuse, the non-production of the written surrender (*i*).

§ 732. Though the doctrine of surrender by operation of law was originally confined to cases where the tenant accepted from his lessor a new interest, inconsistent with that which he previously had, it has by modern decisions been considerably extended, and is now applied, not only to the case where the second lease is granted

(*f*) *Donellan v. Read*, 3 B. & Ad. 905; *Lambert v. Norris*, 2 M. & W. 335.

(*g*) *Magennis v. MacCullough*, Gilb. Eq. R. 236; *Roe v. Archbishop of York*, 6 East, 86, 101; *Wootley v. Gregory*, 2 Y. & Jer. 536; *Bolton v. Bishop of Carlisle*, 2 H. Bl. 263, 264; *Doe v. Thomas*, 9 B. & C. 288; 4 M. & R. 218, S. C.; *Walker v. Richardson*, 2 M. & W. 882; *Natchbolt v. Porter*, 2 Vern. 112; 4 Cruise's Dig. 85, White's Ed. Tit. 32, ch. 7, §§ 5, 6, 7; 4 Kent, Com. 104; *Roberts on Frauds*, 251, 252; id. 248, 249; *Holbrook v. Tirrell*, 9 Pick. 105.

(*h*) *Bolton v. Bishop of Carlisle*, 2 H. Bl. 263, 264; *Walker v. Richardson*, 2 M. & W. 892.

(*i*) *Doe v. Thomas*, 9 B. & C. 288, 298—300; 4 M. & Ry. 218, S. C.; *Walker v. Richardson*, 2 M. & W. 882.

to the lessee himself, or to the lessee and his wife, or to the lessee and a stranger (*k*), but to any act done by the landlord, which creates a new interest in a third party, inconsistent with the tenant's former interest; provided the tenant and the third party concur in such act, and the former *actually gives up possession* in consequence of it (*l*). Thus, a demise by the lessor to a stranger, with the assent of the lessee, if coupled with an actual change of possession, is a surrender by operation of law of the lessee's interest, whether it be freehold or leasehold (*m*). So, although a parol license to quit, even followed by an actual quitting, will not of itself operate as a surrender of the tenant's interest (*n*); yet if the tenant gives up possession in pursuance of such a license, and the landlord accepts it, the license, coupled with the change of possession, will amount to a surrender by operation of law, and the landlord will not be able to recover any rent becoming due after his acceptance of the possession (*o*).

§ 733. It is true that this doctrine has been recently questioned by the Court of Exchequer, and Mr. Baron Parke has suggested that the cases on which it rests may be supported on the ground, that the occupation of the landlord's new tenants might "have the effect of eviction by the landlord himself, in superseding the rent or

(*k*) Shep. Touchst. 301; Hamerton v. Stead, 3 B. & C. 478.

(*l*) Thomas v. Cook, 2 Stark. R. 408; 2 B. & A. 119, S. C.; Stone v. Whiting, 2 Stark. R. 235; Dodd v. Acklom, 6 M. & Gr. 672; Lynch v. Lynch, 6 Ir. Law R. 131; Walker v. Richardson, 2 M. & W. 882; Grimman v. Legge, 8 B. & C. 324; 2 M. & R. 438, S. C.; Bees v. Williams, 2 C. M. & R. 581; Graham v. Whichelo, 1 Cr. & Mee. 188; Reeve v. Bird, 1 C. M. & R. 31; 4 Tyr. 612, S. C.; Hall v. Burgess, 5 B. & C. 332; Nicholls v. Atherstone, 11 Jurist, 778.

(*m*) Cases cited in last note; especially Lynch v. Lynch, 6 Ir. Law R. 131. In Doe v. Wood, 14 M. & W. 682, M., tenant from year to year to B. died, leaving his widow in possession. A., some time after, took out administration, but the widow continued in possession, paying rent to B. within A.'s knowledge, and A. not objecting. Held, that these facts did not amount to a surrender on A.'s part by operation of law, and, consequently, that A., on proof of M.'s tenancy and death, and his own title as administrator, could recover in ejectment against the widow.

(*n*) Mollett v. Brayne, 2 Camp. 103, per Lord Ellenborough. See also Doe v. Milward, 3 M. & W. 328, and Johnstone v. Huddleston, 4 B. & C. 922.

(*o*) Grimman v. Legge, 8 B. & C. 324; 2 M. & R. 438, S. C.; Dodd v. Acklom, 6 M. & Gr. 672; Whitehead v. Clifford, 5 Taunt. 518.

compensation for use and occupation during the continuance of that occupation" (*p*). Several of the cases may certainly be explained in this manner; and one was expressly decided on a somewhat similar ground (*q*); but in *Thomas v. Cook* (*r*), which is the leading authority on the subject, this point was neither suggested in argument, nor alluded to by the Court; and in *Lynch v. Lynch* (*s*), which was much discussed in Ireland, the point could not have been taken at all, it being an action of ejectment brought by the former lessees for life, against the party who, with their assent, had been substituted in their place by the landlord. Moreover, the Court of Queen's Bench have very recently declared their dissent from the line of argument advanced by Mr. Baron Parke, and have confirmed the rule laid down in *Thomas v. Cook* (*t*). On the whole it is submitted that this rule is good law; and that confined, as it is, to cases where there has been an actual, and, consequently, a notorious shifting of possession, no real danger need be apprehended from its continuance. Its adoption, where reversions or incorporeal hereditaments are disposed of, which pass only by deed, or its extension to cases where corporeal estates are dealt with by the consent of the tenant, but where no actual change of possession has taken place, would certainly let in all the dangers for avoiding which the statute was passed; and here we entirely concur with Mr. Baron Parke, who observes, that if this were the law, it would very seriously affect titles to long terms of years; mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor, to a demise from the mortgagor to a third person (*u*). However, as this is not the law at present (*x*), and as there is little reason to suppose that it will ever be so, nothing further need be said on the subject.

(*p*) *Lyon v. Reed*, 13 M. & W. 309, 310.

(*q*) *Gore v. Wright*, 8 A. & E. 118; 3 N. & P. 243, S.C.

(*r*) 2 Stark. R. 408; 2 B. & A. 119, S.C.

(*s*) 6 Ir. Law R. 131.

(*t*) *Nicholls v. Atherstone*, 11 Jurist, 778, 779.

(*u*) *Lyon v. Reed*, 13 M. & W. 309.

(*x*) *Id.* 310, as to estates lying in grant; *Doe v. Johnston*, M'Clel. & Y. 141, as to the assent of tenant, not coupled with change of possession; recognised in *Dodd v. Acklom*, 6 M. & Gr. 679, 682. In *Walker v. Richardson*, 2 M. & W. 882, there was a lease of tolls, but the point that this was a right which lay in grant was never taken.

§ 734. Besides the surrenders by operation of law already alluded to, there are some few which may be effected under the provisions of particular Acts of Parliament. For instance, the Acts relating to *bankrupts* empower a bankrupt lessee to relieve himself from all responsibility under his lease, by simply *delivering it up* (*x*) to the landlord within fourteen days after notice given to him that his assignees decline it; and if the assignees do not elect whether they will decline or accept the lease, they will be compelled by the Court to do so, and in case they decline the same, to deliver it to the landlord. The same rule prevails with regard to agreements for a lease, or agreements for the purchase of any estate or interest in land (*y*). Somewhat similar provisions are also contained in the Acts respecting Insolvent Debtors (*z*).

(*x*) It seems, though the point is not without doubt, that where the bankrupt holds under a demise not in writing, the offering possession is a delivery within the statute. *Slack v. Sharpe*, 8 A. & E. 366; 3 N. & P. 390, S. C.; *Briggs v. Sowry*, 8 M. & W. 729, 739, 741.

(*y*) 6 Geo. 4, c. 16, § 75, enacts, "That any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained; and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect, and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit."

§ 76 enacts, "That if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required), elect whether they will abide by and execute such agreement, or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon order them to deliver up the said agreement, and the possession of the premises, to the vendor or person claiming under him, or may make such order therein as he shall think fit."

(*z*) 1 & 2 Vict. c. 110, § 50, enacts, "That in all cases in which any such prisoner (that is, any person imprisoned for debt, who has petitioned the Insolvent Debtors' Court), shall be entitled to any lease or agreement for a lease, and his assignee or assignees shall accept the same, and the benefit thereof, as part of such

§ 735. With respect to *assignments by operation of law*, it may be observed that, when any person is adjudged a *bankrupt*, his real and personal estate, both present and future, becomes vested in his assignees by virtue of their appointment, without any deed of assignment or conveyance; and on the death or removal of any such assignees, and the appointment of others in their stead, a similar vesting takes place (*a*). So, the recent Act for facilitating arrangements between debtors and creditors (*b*), which enables an insolvent debtor to petition the Court of Bankruptcy to carry into effect any composition to which his creditors have agreed, enacts, in the 8th section, that, from the date of filing the agreement, all the debtor's estate and effects shall vest in the trustee who is appointed, without any deed, as fully as if he were an assignee under the statutes relating to bankruptcy. The Acts, too, which enable certain insolvent debtors to petition the Insolvent Debtors' Court, or the County Courts to protect them from process (*c*), as also the general Insolvent Debtors' Acts (*d*), contain similar provisions. It only remains to add, that a parol assignment by a sheriff of leasehold premises, taken in execution under a *fieri facias*, is void at law, though the assignee has entered and paid rent to the head landlord; and, consequently, the execution debtor may still recover the premises in an action of ejectment against the assignee, and the latter must seek his remedy, if at all, in a court of equity (*e*).

prisoner's estate and effects, the said prisoner shall not be, or be deemed to be, liable to pay any subsequent rent, to which his discharge, adjudicated according to this act, may not apply, nor be in any manner sued after such acceptance in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained: Provided that in all such cases as aforesaid it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the said assignee or assignees shall decline, upon his or their being required so to do, to determine whether he or they will or will not accept such lease or agreement for a lease, to apply to the said Court, praying that he or they may either so accept the same, or *deliver up such lease* or agreement for a lease, and the possession of the premises demised or intended to be demised; and the said Court shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and such order shall be binding on all parties."

(*a*) 1 & 2 Will. 4, c. 56, §§ 24, 25; 5 & 6 Vict. c. 122, §§ 48, 51.

(*b*) 7 & 8 Vict. c. 70.

(*c*) 5 & 6 Vict. c. 116, §§ 1, 7; 7 & 8 Vict. c. 96, §§ 4, 10; 10 & 11 Vict. c. 102, §§ 4, 6, 8.

(*d*) 1 & 2 Vict. c. 110, §§ 37, 45.

(*e*) *Doe v. Jones*, 9 M. & W. 372; 1 Dowl. N. S. 352, S. C.

§ 736. The Statute of Frauds further requires that the declaration or creation of *trusts* of lands shall be manifested by some writing, signed by the party creating the trust; and that all grants and assignments of any such trust shall also be in writing, signed in the same manner (*f*). The statute does not require that the trust itself should be created by writing; but only that it should be manifested by writing; plainly meaning that there should be evidence in writing, proving that there was a trust, and what the trust was. A letter acknowledging the trust, and, *a fortiori*, an admission in an answer in Chancery, has therefore been deemed sufficient to satisfy the statute (*g*).

§ 737. *Resulting trusts*, or those which arise by implication of law, are specially excepted from the operation of the Act (*h*). Trusts of this sort arise in three cases. First, where the estate is purchased in the name of one person, but the purchase-money is paid by another (*i*); and here, it matters not whether the legal estate be freehold, copyhold, or leasehold; whether it be taken in the names of the purchaser and others jointly, or in the names of others, without that of the purchaser; or in one name or in several, jointly, or successive; but in all cases the trust will result to the

(*f*) 29 Car. 2, c. 3, § 7, enacts, "That all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

§ 8 provides, "That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

§ 9 enacts, "That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting the same, or by such last will or devise, or else shall likewise be utterly void and of none effect." See the corresponding Irish Act of 7 Will. 3, c. 12, §§ 10, 11, 12.

(*g*) *Forster v. Hale*, 3 Ves. 696, 707, per Lord Alvanley; *Randall v. Morgan*, 12 Ves. 67; *Roberts on Frauds*, 95; 3 Sugden, V. & P. 252; 4 Kent Com. 305.

(*h*) See note (*f*), ante.

(*i*) *Lloyd v. Spillet*, 2 Atk. 150, per Lord Hardwicke.

man who advances the purchase-money (*k*), unless such a resulting trust would break in upon the policy of some statute (*l*), or unless the purchase be effected by a father in the name of an unprovisioned child, legitimate, or illegitimate (*m*), or in the joint names of such child and another person (*n*). In this case of the purchase by a father, the trust will not be deemed a resulting trust for him, but a gift or advancement for the child; because a father is bound in conscience to provide for his child (*o*). Resulting trusts will arise, secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and thirdly, in cases of fraud (*p*). Other divisions have been suggested (*q*); but they all seem reducible to these three heads. In all these cases it appears now to be generally conceded, that parol evidence, though received with great caution, and not deemed sufficient unless of a clear character (*r*), is admissible to establish the collateral facts (not contradictory to the deed, unless in the case of fraud), from which a trust may legally result; and that it makes no difference as to its admissibility whether the nominal purchaser be living or dead (*s*). It has, indeed, been doubted whether parol evidence is admissible against the answer of the trustee denying the trust (*t*); but there seems no good reason why such a doubt should be entertained (*u*). As a resulting trust may be established by parol evidence, it may also, notwithstanding the statute, be rebutted by the same species of proof; and, therefore,

(*k*) *Dyer v. Dyer*, Watk. Copyh. 216, per Eyre, C. B.; 3 Sugden, V. & P. 255, 256; *Wray v. Steele*, 2 Ves. & Bea. 388; *Baxter v. Brown*, 7 M. & Gr. 215.

(*l*) *Ex parte Houghton*, 17 Ves. 251; *Redington v. Redington*, 3 Ridg. P. C. 106.

(*m*) *Beckford v. Beckford*, Lofft, 490; 3 Sugden, V. & P. 262.

(*n*) *Lamplugh v. Lamplugh*, 1 P. Wms. 112. (*o*) 3 Sugden, V. & P. 262.

(*p*) *Lloyd v. Spillet*, 2 Atk. 150, per Lord Hardwicke.

(*q*) 1 Lomax Dig. 200.

(*r*) *Wilkins v. Stevens*, 1 Y. & Col. Ch. C. 431; *Groves v. Groves*, 3 Y. & Jer. 170.

(*s*) 3 Sugden, V. & P. 257—260; 2 Story, Eq. Juris. § 1201, n.; *Lench v. Lench*, 10 Ves. 517; 3 Law Mag. 131—139; 4 Kent, Com. 305; *Boyd v. M'Lean*, 1 Johns. Ch. R. 582; *Pritchard v. Brown*, 4 N. Hamp. 397; *Goodwin v. Hubbard*, 15 Mass. 218, note by Mr. Rand.

(*t*) 3 Sugden, V. & P. 256, 257.

(*u*) 3 Law Mag. 136—138; *Bartlett v. Pickersgill*, 4 East, 577, n., per Lord Keeper Henley.

parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially (x).

§ 738. Section 4 of the same statute (y) enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the *agreement*, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. Section 17 (z) also enacts, that no contract for the sale of goods, wares, or merchandise, for the price of ten pounds or upwards, shall be good, unless the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or unless "some note or memorandum in writing of the said *bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." This last enactment is extended, by Lord Tenterden's Act (a), "to all contracts for the sale of goods of the value of ten pounds and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

§ 739. Though the language of the 4th section, relating to

(x) 3 Sugden, V. & P. 260; *Edwards v. Edwards*, 2 You. & Col. Ex. R. 123; *Brady v. Cubitt*, 1 Doug. 31, 39; *Goodright v. Hodges*, Watk. Copyh. 227; 2 East, 534, n.

(y) § 7 of 7 Will. 3, c. 12, Ir. corresponds with this section.

(z) § 21 of 7 Will. 3, c. 12, Ir. corresponds with this section.

(a) 9 Geo. 4, c. 14, § 7. This act also extends the similar enactment contained in § 21 of 7 Will. 3, c. 12, Ir.

sales of lands, varies in some trifling respects from that used in the 17th section, respecting sales of goods, the meaning is substantially the same in both sections (*b*); and in order to satisfy either, the *consideration* for the *agreement* in the one case, and for the *bargain* (*c*) in the other, must appear expressly or impliedly in the writing signed by the party to be charged. This rule applies, not only to agreements upon consideration of marriage (*d*), or to contracts for the sale of lands, or to agreements not to be performed within a year (*e*); but also to special promises made, either by executors or administrators, to answer damages out of their own estate, or by any person to answer for the debt, default, or miscarriage of another (*f*). In none of these cases is it necessary that the consideration should be stated on the face of the written memorandum in express terms; but it will be sufficient if it can be collected, not indeed by mere conjecture however plausible (*g*), but by fair and reasonable, if not necessary, intendment from the whole

(*b*) *Kenworthy v. Schofield*, 2 B. & C. 947, per Bayley, J.

(*c*) *Egerton v. Mathews*, 6 East, 307, may appear at variance with this rule, but the bargain there, like all bargains for the purchase of goods, imported consideration on the face of it. See per Park, J., in *Jenkins v. Reynolds*, 3 B. & B. 21; and *Hunt v. Adams*, 5 Mass. 360, 361.

(*d*) See *Saunders v. Cramer*, 3 Dru. & War. 87.

(*e*) *Lees v. Whitcomb*, 5 Bing. 34; 2 M. & P. 86, S. C.; *Sykes v. Dixon*, 9 A. & E. 693; 1 P. & D. 463, S. C.; *Sweet v. Lee*, 3 M. & Gr. 466.

(*f*) *Wain v. Warlters*, 5 East, 10; *Saunders v. Wakefield*, 4 B. & A. 595; *Jenkins v. Reynolds*, 3 B. & B. 14; 6 J. B. Moore, 86, S. C.; *Morley v. Boothby*, 3 Bing. 107; 10 B. Moore, 395, S. C.; *Bushell v. Beavan*, 1 Bing. N. C. 103; 4 M. & Sc. 622, S. C. The same rule prevails in Ireland, *Whitmore v. Johnson*, 1 Jebb & Sym. 8; *Joint v. Mortyn*, 2 Fox & Smith, 4; in New York, *Sears v. Brink*, 3 Johns. 210; *Leonard v. Vrendenburg*, 8 Johns. 29; and in New Hampshire, *Neelson v. Sanborne*, 2 N. Hamp. 414. But in Massachusetts, it was rejected by the whole court, upon great consideration, in *Packard v. Richardson*, 17 Mass. 122, and this decision has been upheld by the legislature of that State; the revised stat. c. 74, § 2, providing that the consideration of the promise, contract, or agreement, need not be set forth in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence. So the rule is rejected in Maine, *Levy v. Merrill*, 4 Greenl. 180; in Connecticut, *Sage v. Wilcox*, 6 Conn. 81; in New Jersey, *Buckley v. Beardsley*, 2 South. 570; in North Carolina, *Miller v. Irvine*, 1 Dev. & Bat. 103; and in South Carolina, *Fyler v. Givens*, *Riley's Law Cas.* 56, 62. See also *Violet v. Patton*, 5 Cranch, 142; *Taylor v. Ross*, 3 Yerg. 330; 3 Kent Com. 122.

(*g*) *Hawes v. Armstrong*, 1 Bing. N. C. 765, 766, per Tindal, C. J.; *James v. Williams*, 5 B. & Ad. 1109, per Patteson, J.; *Raikes v. Todd*, 8 A. & E. 855, 856, per Lord Denman.

tenor of the writing (*h*). Thus, where a party had signed a guarantee in the following terms, "To M. I guarantie to you 200*l*. in case A. should make default in the capacity of agent to you," it was held that this memorandum sufficiently implied, as a consideration for the promise, that A. should be employed as agent to M. (*i*); but where the words were, "As you have a claim on my brother for 5*l*. for shoes, I undertake to pay you the amount within six weeks," the Court held that this did not satisfy the statute, as it could not be reasonably inferred from the language employed, that the consideration for the undertaking was forbearance towards the principal debtor in the mean time (*k*). So, where the guarantee was as follows:—"June 28, Mr. P. I will see you paid 5*l*. worth of leather, on 6th December, for B., shoemaker,"—the Court refused to infer, that it was given for leather to be subsequently supplied (*l*).

§ 740. Before leaving the subject of the consideration, it may be observed generally, that in order to support an assumpsit, the consideration, whether express or implied, must move from the plaintiff, and be such as he has the means of performing or causing to be performed; and moreover, it must not be contaminated with any illegal, fraudulent, or immoral transaction, nor contravene any rule of the common or statute law; but subject to these restrictions, any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or disadvantage sustained by the plaintiff, however small the benefit on the one hand, or the inconvenience on the other, may be, is a sufficient consideration, if such act be performed, or inconvenience suffered, by the plaintiff, with the consent, express or implied, of

(*h*) *Joint v. Mortyn*, 2 Fox & Smith, 4; *Saunders v. Cramer*, 3 Dru. & War. 87; *Price v. Richardson*, 15 M. & W. 540.

(*i*) *Kennaway v. Treleavan*, 5 M. & W. 498. See also *Newbury v. Armstrong*, 6 Bing. 201; 3 M. & P. 509; M. & M. 389, S. C.; *Stadt v. Lill*, 9 East, 348; 1 Camp. 242, S. C. nom. *Stapp v. Lill*; *Jarvis v. Wilkins*, 7 M. & W. 410; *Johnston v. Nicholls*, 1 Com. B. 251; *Shortrede v. Cheek*, 1 A. & E. 57.

(*k*) *James v. Williams*, 5 B. & Ad. 1109; *Hawes v. Armstrong*, 1 Bing. N. C. 761; *Bentham v. Cooper*, 5 M. & W. 621. See further on this subject, 1 Smith Lead. Ca. 134—138, and the cases there collected; and 1 Wms. Saund. 211, et seq.

(*l*) *Price v. Richardson*, 15 M. & W. 539. *But if the language of the guarantee leaves it doubtful whether the consideration moved thereon be a past or present consideration, parol evidence will be admissible to explain the ambiguity.* *Goldsheele v. Swan* 1. Ex. R. 154, and cases there cited.

the defendant, or in the language of pleading, at the special instance and request of the defendant (*l*).

§ 741. It is further essential to the validity of the written document, that the names of both contracting parties (*m*), as also the general terms of the contract, and the promise (*n*), should be stated therein, either directly or by reference (*o*); but it will suffice, if the memorandum, without condescending to minute particulars, contains all that leads to future certainty. For instance, if a party agrees to pay rent for a certain farm at a specified sum per acre (*p*), or to pay for all goods supplied to a third party during the antecedent month, or even to liquidate *the debt* of such third party in consideration of forbearance, the written memorandum need not specify the number of acres, the quantity of the goods, or the amount of the debt; because each of these facts is capable of being ascertained with certainty by subsequent inquiry (*q*). If it be contended, that in the last instance given the memorandum is insufficient, as there may be two or more debts owing from the third party, and it does not appear to which of these the writing applies, the answer is clear;—namely, that the Court will not presume the existence of more debts than one, but will call upon the party impeaching the document to furnish proof of that fact, and consequently, in the absence of such proof, the maxim, *de non apparentibus et de non existentibus eadem est ratio*, will be held to apply (*r*). Again, a written order for goods “on moderate

(*l*) 1 Selw. N. P. 46; 2 Wms. Saund. 137 g—137 k, and cases there collected.

(*m*) *Champion v. Plummer*, 1 New R. 252; *Wheeler v. Collier*, M. & M. 125, per Lord Tenterden; *Boyce v. Green*, Batty, R. 608.

(*n*) *Carroll v. Cowell*, 1 Jebb & Sym. 43; *Morgan v. Sykes*, cited in argument in *Coats v. Chaplin*, 3 Q. B. 486.

(*o*) “I admit that an agreement is not perfect, unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, the subject matter of the contract, the consideration, and the promise,” per Tindal, C.J., in *Laythorp v. Bryant*, 2 Bing. N. C. 742.

(*p*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 73, per Lord Redesdale.

(*q*) *Bateman v. Phillips*, 15 East, 272; *Shortrede v. Cheek*, 1 A. & E. 58, 60; *Bleakley v. Smith*, 11 Sim. 150.

(*r*) *Shelton v. Braithwaite*, 7 M. & W. 437, 438; *Shortrede v. Cheek*, 1 A. & E. 57; *Dobell v. Hutchinson*, 3 A. & E. 371; *Powell v. Dillon*, 2 Ball & Beat. 420.

terms" will satisfy the statute (*s*), though, if a specific price be agreed upon, it must be mentioned in the contract (*t*).

§ 742. Neither is it necessary that the written evidence, required by this and similar statutes, should be comprised in a single document, nor that it should be drawn up in any particular form; but it will suffice, if the contract can be *plainly made out in all its terms from any writings* of the party, or even from his *correspondence* (*u*). Nay, a signed letter will be sufficient, though it does not contain in itself any one of the terms of the agreement, if it distinctly refers to and recognises any writing which does contain them (*x*). The entire contract, however, must be collected from the *writings*; verbal testimony not being admissible to supply any defects or omissions in the written evidence (*y*). For the policy of the statute is to prevent fraud and perjury, by taking all the enumerated transactions out of the reach of any verbal testimony. Still, though parol evidence cannot be received to alter the terms of the written contract, or to supply any omissions in it, such evidence may be admitted to show the situation of the parties at the time the contract was made (*z*); as also to explain the language employed (*a*), or, it seems, even to fix the date at which it was committed to writing (*b*).

§ 743. Again, it does not signify to whom the memorandum containing the agreement or bargain is addressed, because the memorandum is not necessary to *constitute* the contract, but merely to furnish satisfactory *proof* of it. A letter, therefore, addressed

(*s*) *Ashcroft v. Morrin*, 4 M. & Gr. 450.

(*t*) *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343, S. C.

(*u*) *Allen v. Bennet*, 3 Taunt. 169; *Jackson v. Lowe*, 1 Bing. 9; *Phillimore v. Barry*, 1 Camp. 513, per Lord Ellenborough.

(*x*) *Dobell v. Hutchinson*, 3 A. & E. 355, 371; 5 N. & M. 251, 260, S. C.; 1 Sugden, V. & P. 171.

(*y*) *Boydell v. Drummond*, 11 East, 142; 2 Camp. 163, S. C.; 2 Kent Comm. 511; *Roberts on Frauds*, 121; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 280—282; *Abeel v. Radcliff*, 13 Johns. 297.

(*z*) *Sweet v. Lee*, 3 M. & Gr. 466, per Tindal, C. J.

(*a*) *Sweet v. Lee*, 3 M. & Gr. 452.

(*b*) *Edmunds v. Downes*, 2 Cr. & Mee. 459; *Hartley v. Wharton*, 11 A. & E. 934; 3 P. & D. 529, S. C.; *Lobb v. Stanley*, 5 Q. B. 574.

to a third party will suffice (*c*); and even, where the party to be charged had attested a deed, which recited the agreement, this was held to be sufficient, as it appeared that in fact he knew of the recital (*d*). But a written memorandum, made after the action is brought will not satisfy the statute (*e*).

§ 744. The *place of signature* is also immaterial, as the statute does not require that the writing should be *subscribed* by the party to be charged, but merely that it should be signed. If, therefore, a party inserts his name, either at the beginning, or in the body, of a document, for the purpose of authenticating it, this will be equally valid with a signature at the foot (*f*); though in these cases it will always be a question for the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it (*g*). Where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both parties in the body of the instrument, but concluded "As witness our hands," and no signatures were subscribed, the Court held that the statute was not satisfied, as it was obviously intended that the agreement should not be perfect till the names were added at the foot (*h*).

§ 745. With respect to the *mode of signature*, it matters not whether the Christian name be set out at length or denoted by the initial, or omitted altogether (*i*); but it seems that the surname must be written at length, and that if the letter be signed by the mere initials of the party (*k*), or if it be subscribed, without

(*c*) Longfellow v. Williams, Pea. Add. Cas. 225, per Lawrence, J.; per Lord Hardwicke, 3 Atk. 503; 2 Ch. R. 147; 1 Vernon, 110; 1 Smith Lead. Ca. 137.

(*d*) Welford v. Beezely, 1 Ves. Sen. 6; 1 Wils. 118, S. C.

(*e*) Bill v. Bament, 9 M. & W. 36.

(*f*) Lobb v. Stanley, 5 Q. B. 574, 583; Johnson v. Dodgson, 2 M. & W. 659, per Lord Abinger; Knight v. Crockford, 1 Esp. 190, 193, per Eyre, C. J.; Lemayne v. Stanley, 1 Lev. 1; Ogilvie v. Foljambe, 3 Mer. 53; Saunderson v. Jackson, 2 B. & P. 238, per Lord Eldon; Hammersley v. Baron de Biel, 12 Cl. & Fin. 63, per Lord Cottenham; Bleakley v. Smith, 11 Sim. 150. See post, § 765.

(*g*) Johnson v. Dodgson, 2 M. & W. 659, per Lord Abinger.

(*h*) Hubert v. Treherne, 3 M. & Gr. 743; 4 Scott, N. R. 486, S. C.

(*i*) Lobb v. Stanley, 5 Q. B. 574, 581; Ogilvie v. Foljambe, 3 Mer. 53.

(*k*) Hubert v. Moreau, 2 C. & P. 528; 12 B. Moore, 216, S. C.; Sweet v. Lee, 3 M. & Gr. 452, 460.

signature, "by your affectionate mother" (*l*), or the like, it will not suffice. Even a *printed* signature has been held sufficient where the party to be charged had written other parts of the memorandum, or had done other acts amounting to a recognition of his printed name (*m*). Again, it is unnecessary that the agreement or memorandum should be signed *by both parties*; for the Statute of Frauds only requires that it should be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded (*n*). If it be said that, unless the plaintiff also signs, there is a want of mutuality, the answer is, that the defendant had it in his power to require the plaintiff's signature; and that if he has not done so, it is his own fault (*o*). Even a written proposal accepted by parol has been deemed sufficient (*p*).

§ 746. Having made these general observations, which will be found to apply, not only to the Statute of Frauds, but to most, if not all, of the acts that render documentary proof necessary, it remains for us to notice briefly such of the transactions enumerated in sections 4 and 17 of the Act of Charles the Second, as seem to require explanation. And first as to *guarantees*. Here the main difficulty is to distinguish between *original* and *collateral* promises; that is, between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default (*q*). As this is a question of fact for the jury, it is impossible to lay down any precise rule of

(*l*) *Selby v. Selby*, 3 Mer. 2, per Sir Wm. Grant.

(*m*) *Schneider v. Norris*, 2 M. & Sel. 286; *Saunderson v. Jackson*, 2 B. & P. 238.

(*n*) *Laythorp v. Bryant*, 2 Bing. N. C. 735; 8 Scott, 238, S. C.; *Seton v. Slade*, 7 Ves. 275, per Lord Eldon; *Egerton v. Mathews*, 6 East, 307; *Allen v. Bennet*, 3 Taunt. 169. The last two cases were decisions on § 17, which uses the word *parties*. These cases overrule the dicta of Lord Redesdale and Sir T. Plummer in *Lawrence v. Butler*, 1 Sch. & Lef. 13; and *O'Rourke v. Perceval*, 2 Ball & Beat. 58. See 3 M. & Gr. 462 n., and 2 Kent, Com. 510.

(*o*) *Laythorp v. Bryant*, 2 Bing. N. C. 743, per Tindal, C. J.

(*p*) Per Cresswell, J., in *Ashcroft v. Morrin*, 4 M. & Gr. 451.

(*q*) *Birkmyr v. Darnell*, Salk. 27; 1 Smith Lead. Ca. 134, S. C.; *Forth v. Stanton*, 1 Wms. Saund. 211 a—211 e; *Barrett v. Hyndman*, 3 Ir. Law R. 109.

construction, but each case must be determined on its own merits (*q*); it being remembered that original promises will be valid, though verbally made (*r*), while collateral promises must be in writing, in order to satisfy the statute. Again, as the promise must, in the words of the Act, be one "to answer for the debt, default, or miscarriage of another," the liability of that other must continue notwithstanding the promise, or the defendant will not be allowed to rely on the absence of a written document. For instance, if a defendant, in consideration that the plaintiff will discharge out of custody his debtor taken on a *ca. sa.*, promises to pay the debt, this promise need not be in writing, it being regarded as an original one; because, the moment the debtor is discharged, *his* liability is at an end, and the promise of the defendant cannot take effect till after the discharge (*s*). So, where a creditor had issued execution against a debtor, but subsequently it was arranged with the assent of all parties that the debtor should convey his property to a third party, who thereupon undertook, in consideration of the creditor relinquishing his execution, to pay the amount of the debt, it was held that this undertaking was not within the statute, as the effect of the arrangement was to discharge the original debtor (*t*). So, where A. promised B. to pay him a certain sum in case he withdrew his record in an action against C. for assault and battery, this was held to be an original promise (*u*).

§ 747. On the other hand, where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid, the Court held, that inasmuch as the debtor's liability was kept alive by the warrant, the defendant's undertaking should be regarded in the light of a collateral guarantee, and as such, was a promise within the meaning of the

(*q*) 1 Wms. Saund. 211 b; 1 Smith Lead. Ca. 134.

(*r*) Unless for the purchase of goods above the value of 10*l*. See ante, § 738.

(*s*) Goodman v. Chase, 1 B. & A. 297; Butcher v. Steuart, 11 M. & W. 857, 873; Lane v. Burghart, 1 Q. B. 933, 937, 938; 1 G. & D. 312, S. C.

(*t*) Bird v. Gammon, 3 Bing. N. C. 883; 5 Scott, 213, S. C.

(*u*) Read v. Nash, 1 Wils. 305; recognised in 3 Bing. N. C. 889; but questioned in 1 Wms. Saund. 211 c, 211 d.

statute (*x*). So, where it was agreed between a plaintiff, his attorney, and the defendant, that in consideration of the discontinuance of the suit, the defendant should pay the attorney the costs due from the plaintiff, this was considered a promise to pay the debt of another, as, in the event of its breach, the attorney might still recover his costs from the plaintiff who retained him (*y*). Moreover, it makes no difference whether the goods were delivered to the third party (*z*), or the debt incurred, or the default committed by him, *before* or *after* the promise by the defendant; for a promise to *indemnify*, if not within the words, is at least within the spirit of the statute; and, consequently, where the language was, in effect, this:—"If you will become bail for A., and he forfeits his bail-bond, I will save you harmless," it was held to be an answering for the default of another (*a*).

§ 748. Again, the statute applies to promises to answer for the *tortious* default or miscarriage of another, as well as for his breach of *contract*; and, therefore, where A. had killed the plaintiff's horse by hard riding without his leave, a verbal promise by the defendant to pay the damage, in consideration of the plaintiff forbearing to sue A., was held to be void (*b*). Where an entire promise is invalid as to a part, for not being in writing, no action can be brought on the remainder which is not within the statute, but the whole promise, being indivisible, will be void (*c*). A promise to pay the promisee's own debt to a third person need not be in writing, for the act merely applies to promises made to the person to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee* (*d*).

(*x*) *Lane v. Burghart*, 3 M. & Gr. 597.

(*y*) *Tomlinson v. Gell*, 6 A. & E. 564; 1 N. & P. 588, S. C.

(*z*) *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Bl. 120.

(*a*) *Green v. Cresswell*, 10 A. & E. 453, 458; 2 P. & D. 430, S. C., overruling the dicta of Bayley and Parke, Js., in *Thomas v. Cook*, 8 B. & C. 728; 3 M. & Ry. 444, S. C.; and explaining *Adams v. Dansey*, 6 Bing. 506.

(*b*) *Kirkham v. Marter*, 2 B. & A. 613.

(*c*) *Lexington v. Clark*, 2 Vent. 223; *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664, 671; *Mechelen v. Wallace*, 7 A. & E. 49.

(*d*) *Eastwood v. Kenyon*, 11 A. & E. 438, 446; 3 P. & D. 276, S. C.; Har-

§ 749. With respect to "*agreements made in consideration of marriage*," the first observation which occurs is, that these words do not embrace mutual promises to marry; and therefore, notwithstanding the act, such promises may be verbally made, as indeed is usually the case (*e*). It may next be noticed, that although, as a general rule, equity will enforce a contract, even void by the statute, provided there has been such a part performance on the side of the plaintiff, as that it would be a fraud on him, if the defendant could object that the agreement was not in writing (*f*),—yet it has been repeatedly held, that the act of marriage *per se* is not a part performance within this rule (*g*); and, therefore, if a suitor verbally agrees to settle property on his intended wife, and the lady, relying on his honour, marries him, she cannot compel the performance of this agreement (*h*); neither can a suitor, after simply marrying his intended wife, enforce the specific performance of a parol agreement made by her father with reference to settlements (*i*). Perhaps, however, in the event of a clear case of fraud being established, the Court, notwithstanding the act, would compel the father to realise the expectations, on the faith of which the marriage was contracted (*k*); and there seems to be little doubt but that, if the father were to say to the suitor, "Marry my daughter, and settle so much a year on her for her jointure, in which case I will give you so much for her portion," this proposal, though not reduced to writing, would amount to a valid contract in equity, if the marriage were actually to take place, and the jointure were settled (*l*). It is also the better opinion, that a verbal agreement made before marriage will be enforced in equity, if subsequently to the marriage it has been recognised and

greaves v. Parsons, 13 M. & W. 561, 570, per Parke, B.; *Thomas v. Cook*, 8 B. & C. 728; 3 M. & Ry. 444, S. C.

(*e*) B. N. P. 280, c.

(*f*) *Clinan v. Cooke*, 1 Sch. & Lef. 41; *Kine v. Balfe*, 2 Ball & Beat. 347, 348.

(*g*) *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 64, per Lord Cottenham; *Redding v. Wilks*, 3 Bro. C. C. 401.

(*h*) *Montacute v. Maxwell*, 1 P. Wms. 619.

(*i*) *Dundas v. Dutens*, 1 Ves. 199.

(*k*) *Baron de Biel v. Hammersley*, 3 Bea. 469, 475, 476, per Lord Langdale; 12 Cl. & Fin. 86, per Lord Brougham, S. C.

(*l*) *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 45, 64, per Lord Cottenham; 65 & 66, per Lord Campbell and Lord Lyndhurst.

adopted in writing (*m*). But the Court of Chancery will not interfere, even though there be a written memorandum, unless it appears that the marriage was contracted on the faith of the agreement; and, therefore, where a father wrote to his daughter, saying that he had agreed to give her intended husband 8000*l.* as her portion, and this letter was never shown to the husband, it was held not to be such an agreement in writing as satisfied the statute, since the husband could not have married in confidence of the letter (*n*).

§ 750. In interpreting what is meant by an *agreement that is not to be performed within a year* from the making thereof, the Courts have held that a *part performance* is not sufficient; but that whenever it appears, either by express stipulation, or by inference from the circumstances, that the contract is not to be *completed* within the year, there must be documentary proof of the agreement (*o*). If, therefore, a farm-servant is verbally hired for a year's service, which is to commence at a future day, he cannot maintain an action against his master for discharging him before the expiration of the year, though he has faithfully performed his duty as such servant up to the date of his discharge (*p*). But though no action can be brought on the parol agreement, it will not be void for all purposes; for, in the event of a sufficient service under it, the servant may acquire a settlement (*q*). Again, the mere fact that the contract may be determined by the parties within the year, will not take the case out of the statute, if by its terms it purports to be an agreement, that is not to be completely performed till after the expiration of that period (*r*). For the rule of law here is the same as in the case of a defeasible estate, where,

(*m*) *Hammersley v. Baron de Biel*, 12 Cl. & Fin. 64, per Lord Cottenham, citing *Hodgson v. Hutchenson*, 5 Vin. Abr. 522; *Taylor v. Beech*, 1 Ves. Sen. 297; and *Mountague v. Maxwell*, 1 Str. 236; and questioning *Randall v. Morgan*, 12 Ves. 73, where Sir William Grant expressed serious doubt upon the subject. See also, 12 Cl. & Fin. 86, per Lord Brougham; and 3 Bea. 475, 476, per Lord Langdale.

(*n*) *Ayliffe v. Tracy*, 2 P. Wms. 65.

(*o*) *Boydell v. Drummond*, 11 East, 142, 166, 169.

(*p*) *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Huntingfield*, 1 C. M. & R. 20; 4 Tyr. 606, S. C.; *Giraud v. Richmond*, 2 Com. B. 835.

(*q*) 1 B. & A. 727, per Bayley, J.

(*r*) *Birch v. Earl of Liverpool*, 9 B. & C. 392, 395; 4 M. & Ry. 380, S. C.

if a party enters, he is *in* of the whole estate, though an event may afterwards occur, which would prevent the estate from continuing during the entire term contemplated in the original grant (*s*). Still, if the agreement is silent as to the time within which it is to be performed, and its duration rests upon a contingency, which may or may not happen within the year, as, for instance, if it depends on the death or marriage of a party, the length of a voyage, the giving of a notice, or the like, the case is not within the statute, though the event, which is to terminate the agreement, does not in fact occur within the year (*t*). It would seem, also, that the statute does not apply where the action is brought upon an *executed* consideration (*u*); for as the object of the Legislature clearly was, to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives,—it does not appear unreasonable to limit the statute to such actions only as are brought to recover damages for the *non-performance* of contracts, which are not to be performed within a year from the time of their being made (*v*).

§ 751. The term, *interest in lands*, used in the 4th section, is one that has given rise to much litigation, and its meaning is not yet satisfactorily defined. There can be little doubt, however, that it extends to a contract to abate a tenant's rent (*x*); or to submit to arbitration the question whether a lease shall be granted (*y*); or to relinquish a tenancy, and let another party into possession for the residue of a term (*z*); or to permit the profits of a clergyman's living to be received by a trustee (*a*); or to take furnished

(*s*) *R. v. Herstmonceaux*, 7 B. & C. 555, per Bayley, J. See ante, §§ 729, 730.

(*t*) *Souch v. Strawbridge*, 2 Com. B. 808; *Wells v. Horton*, 4 Bing. 40; 12 B. Moore, 177, S. C.; *Gilbert v. Sykes*, 16 East, 154; *Peter v. Compton*, Skin. 353; *Fenton v. Emblers*, 3 Burr. 1278; 1 W. Bl. 353, S. C. See *Mavor v. Payne*, 3 Bing. 285; 11 B. Moore, 2, S. C.

(*u*) See ante, §§ 713, 717; post, §§ 756, 757.

(*v*) *Souch v. Strawbridge*, 2 Com. B. 814, per Tindal, C. J.

(*x*) *O'Connor v. Spaight*, 1 Sch. & Lef. 306.

(*y*) *Walters v. Morgan*, 2 Cox Ch. C. 369.

(*z*) *Buttemere v. Hayes*, 5 M. & W. 456; 7 Dowl. 489, S. C.; *Smith v. Tombs*, 3 Jur. 72, Q. B.; *Cocking v. Ward*, 1 Com. B. 858.

(*a*) *Alchin v. Hopkins*, 1 Bing. N. C. 102; 4 M. & Sc. 615, S. C.

lodgings (*f*). On the other hand, it appears that an equitable mortgage by the deposit of title-deeds (*g*); a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises (*h*); an agreement between a landlord and tenant, that the former shall take at a valuation certain fixtures left by the latter in the house (*i*); or a contract that an arbitrator shall determine the amount of damage sustained by a party, in consequence of a road having been made through his lands (*k*); are not within the statute. How far the Act applies to profits à prendre, easements, and other incorporeal rights relating to lands, is by no means clear; though it seems that, on principle, it should extend to all agreements respecting rights of common, rights of way, grants of rent-charge, tolls, or licenses coupled with an interest, however trifling, in lands (*l*).

§ 752. Whether *shares* in a joint stock company, possessed of *real estate*, can be regarded as an interest in lands, is a somewhat difficult question. In many cases where the company has been incorporated by act of parliament, the legislature has expressly declared, that the shares shall be deemed personal estate (*m*); and here, of course, no doubt exists. So, even in the absence of such a declaration, the better opinion seems to be, that if the company be *incorporated* by statute or by charter from the Crown, and the real property be vested in the corporation, who are to have the sole management of it, the shares of the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of the company (*n*).

(*f*) *Edge v. Strafford*, 1 C. & J. 391; 1 Tyr. 293, S. C.; *Inman v. Stamp*, 1 Stark. R. 12, per Lord Ellenborough; *Mechelen v. Wallace*, 7 A. & E. 49; 2 N. & P. 224, S. C. ~~*Angland v. Angland*~~ (*g*) *Russel v. Russel*, 1 Bro. Ch. C. 269; 12 Ves. 197.

(*h*) *Hoby v. Roebuck*, 7 Taunt. 167.

(*i*) *Hallen v. Runder*, 1 C. M. & R. 266; 3 Tyr. 959, S. C.

(*k*) *Gillanders v. Lord Rossmore*, Jones Ex. R. 504.

(*l*) *Cook v. Stearns*, 11 Mass. 533; *R. v. Salisbury*, 8 A. & E. 716.

(*m*) This is so in the case of all companies subject to the provisions of "The Companies' Clauses Consolidation Act, 1845," 8 & 9 Vict. c. 16, § 7. So also in the case of the Vauxhall Bridge Co., 1 Gl. & Jām. 101; of the Lancaster Canal Co., Mont. & Bl. 112; of the London and Birmingham Rail. Co. (see *Bradley v. Holdsworth*, 3 M. & W. 422), and of many others.

(*n*) *Bligh v. Brent*, 2 You. & Col. Ex. R. 268; *Bradley v. Holdsworth*, 3 M. & W.

If, indeed, the company, being possessed of real estate which formed the basis and subject-matter of the trade out of which the profits were to arise, were *unincorporated*, the shares of the individual copartners would, in such case, seem clearly to fall within the meaning of the 4th section; and this too, whether the company was established by act of parliament or by deed of settlement; and whether the freehold was vested in the collective body, or in trustees appointed by them; for in either case the particular shareholders would, on the dissolution of the company, be possessed of a legal or equitable interest, coextensive with the amount of their shares, in the houses, mines, lands, or other real estate which the company had acquired (*k*).

§ 753. Be this as it may, it appears to be now distinctly determined, that *scrip* and *shares* in joint-stock companies, whether incorporated or unincorporated, are not "*goods, wares and merchandises*," within the 17th section of the Act (*l*). As this point has been ruled on the ground that such shares are mere choses in action, it seems to decide in the negative another question, respecting which all the judges were once equally divided in opinion; namely, whether contracts for the sale of stock were within the Act (*m*).

§ 754. The principal difficulties in interpreting what is meant by an "interest in lands," have arisen in applying that term to cases, where trees, *growing crops*, or other things annexed to the freehold form the subject of the contract; and here, the decisions of the Courts, so far from furnishing a safe guide, only assist in confusing the student, since, to use the words of Lord Abinger, "no general rule is laid down in any of them, that is not contradicted by some other" (*n*). Indeed, the

422; *Hibblewhite v. M'Morine*, 6 M. & W. 214, per Parke, B.; 2 Rail. Ca. 67, S. C.; *Humble v. Mitchell*, 11 A. & E. 205; 2 Rail. Ca. 70, S. C.; *Baxter v. Brown*, 7 M. & Gr. 216, per Tindal, C. J.

(*k*) *Baxter v. Brown*, 7 M. & Gr. 198; *Boyce v. Green*, Batty R. 608. See further as to the transfer of shares in joint stock cos., ante, § 719.

(*l*) *Humble v. Mitchell*, 11 A. & E. 205; 2 Rail. Ca. 70, S. C.; *Hibblewhite v. M'Morine*, 6 M. & W. 214, per Parke, B.; *Knight v. Barber*, 16 M. & W. 66. *See post*

(*m*) *Coll v. Netterville*, 2 P. Wms. 308, per Lord Ch. King.

(*n*) *Rodwell v. Phillips*, 9 M. & W. 505.

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judges themselves have not yet agreed upon any uniform test, by which to try the merits of this question (*o*). In some cases they have endeavoured to solve it by reference to the law of emblements; and have held that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land (*p*). In other cases the test has been, whether the property in dispute could have been seized in execution at common law (*q*); in others again, a distinction has been drawn between *fructus industriales*, and the natural products of the soil (*r*); while, in not a few, the decisions have rested, partly on the legal character of the principal subject-matter of the contract, but principally on the consideration, whether, in order to effectuate *the intention* of the parties, it were necessary to give the vendee an interest in the land (*s*).

§ 755. Such being the uncertain state of the law, the following propositions are submitted with much diffidence,—first, a contract for the purchase of *fruits of the earth, ripe*, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them (*t*). Secondly, a sale of any *growing* produce of the earth, *reared annually by labour and expense*, and in actual existence at the time of the contract,—as, for instance, a growing crop of corn (*u*), or hops (*x*), or potatoes (*y*), or turnips (*z*),—is not within the 4th section of the statute, though the purchaser is to harvest or dig them. Whether the

(*o*) See 1 Sugden V. & P. 141—158.

(*p*) Rodwell v. Phillips, 9 M. & W. 505; Jones v. Flint, 10 A. & E. 758.

(*q*) Dunne v. Ferguson, Hayes, Ex. R. 543; Rodwell v. Phillips, 9 M. & W. 505; Jones v. Flint, 10 A. & E. 758.

(*r*) Jones v. Flint, 10 A. & E. 758, 759, 760; Evans v. Roberts, 5 B. & C. 832; Rodwell v. Phillips, 9 M. & W. 503, per Lord Abinger.

(*s*) Jones v. Flint, 10 A. & E. 759.

(*t*) Parker v. Staniland, 11 East, 362; Cutler v. Pope, 1 Shepl. 337.

(*u*) Jones v. Flint, 10 A. & E. 758; 2 P. & D. 594, S. C.

(*x*) Per Parke, B., in Rodwell v. Phillips, 9 M. & W. 503, questioning Waddington v. Bristow, 2 B. & P. 452. See also Graves v. Weld, 5 B. & Ad. 119, 120.

(*y*) Sainsbury v. Matthews, 4 M. & W. 343; 7 Dowl. 23, S. C.; Evans v. Roberts, 5 B. & C. 829; 8 D. & R. 611, S. C.; Warwick v. Bruce, 2 M. & Sel. 205.

(*z*) Dunne v. Ferguson, Hayes, Ex. R. 540. Emmerson v. Heelis, 2 Taunt. 38, *contrà*, must be considered as overruled by Evans v. Roberts, 5 B. & C. 833, 834, and by Jones v. Flint, 10 A. & E. 759.

same rule would apply to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labour by which they are produced *within the year* in which that labour is bestowed, and consequently, as it seems, do not fall within the law of emblements (*a*), is a question too doubtful for us to decide. Thirdly, an agreement respecting the sale of a crop of growing fruit (*b*), or grass (*c*), or of standing underwood (*d*), growing poles (*e*), or timber, is within the fourth section, and a written contract of sale cannot be dispensed with. In one case an agreement to sell growing timber was held not to convey any interest in the land, but there the vendor contracted to sell the timber at so much per foot, and from the nature of that contract it must be taken to have been the same as if it had related to the sale of timber already felled (*f*). Fourthly, if the land itself is agreed to be sold or let, and the vendee or tenant contracts to purchase the growing crops, this last contract, though the crops taken under it may form the subject of a distinct valuation, will be so incorporated with the agreement relating to the land as to be inseparable from it, and will consequently fall within the 4th section of the Act (*g*).

§ 756. Where growing crops do not amount to an interest in lands, it is clear that an agreement respecting them will fall within the 17th section; and, therefore, at first sight, it may seem unimportant to raise any dispute upon the subject. But, in the first place, there is this material distinction between the 4th and the 17th sections,—namely, that contracts under the former must be stamped, while those under the latter are exempted (*h*); and next, no writing is required by the 17th section, if the subject-matter of

(*a*) *Graves v. Weld*, 5 B. & Ad. 105, 118—120; 1 Sugden V. & P. 166.

(*b*) *Rodwell v. Phillips*, 9 M. & W. 501; resolving a doubt suggested by Little-dale, J., in *Graves v. Weld*, 5 B. & Ad. 116.

(*c*) *Crosby v. Wadsworth*, 6 East, 602; *Carrington v. Roots*, 2 M. & W. 248.

(*d*) *Scorell v. Boxall*, 1 Y. & Jer. 396.

(*e*) *Teal v. Auty*, 2 B. & B. 99; 4 Moore, 542, S.C.

(*f*) *Smith v. Surman*, 9 B. & C. 561; 4 M. & Ry. 455, S.C.; explained by Lord Abinger in *Rodwell v. Phillips*, 9 M. & W. 505.

(*g*) *Earl of Falmouth v. Thomas*, 1 C. M. & R. 89; *Mayfield v. Wadsley*, 3 B. & C. 366, per Little-dale, J.

(*h*) 55 Geo. 3, c. 184, Sch. part 1, tit. Agreement.

the contract is under the value of 10*l.*, or if there has been a part payment, or a part acceptance, by the purchaser (o). It is true, that parol agreements touching lands will be enforced in courts of equity, if they have been performed in some material part; as, for instance, if possession has been distinctly taken under them and rent paid, or the like (p); but even in those courts, such agreements will not be excluded from the operation of the statute by any part performance, which does not place the acting party in such a position, that it would be a fraud upon him if the contract were not completed (q).

§ 757. It was at one time attempted to import this rule into courts of law (r); but the attempt failed (s); and the only relaxations of the statute which the judges at common law will allow, amount to these;—first, if a parol agreement respecting lands has been *entirely executed by both parties*, the contract cannot afterwards be called in question should it be necessary to refer to it for any collateral purpose (t); and next, if it has been *executed by one party*, and the transaction be of such a nature as to admit of an action for use and occupation or in *indebitatus assumpsit*, the other party, perhaps, will not be permitted to defeat this action by setting up the statute (u). For instance, though the performance of a verbal contract to take furnished lodgings, so long as it remains executory, cannot be enforced, yet, if possession under it is taken by the tenant, it may then be supported by the landlord, either as a valid lease for less than three years under the second section of the Act, or, at least, as affording evidence of the terms of such lease (v). But courts of common law will not go further; and therefore if an action be brought *upon the contract itself*, the mere fact that the plaintiff has executed his part of the

(o) Ante, § 738.

(p) *Kine v. Balfe*, 2 Ball & Beat. 347, 348. See *Dale v. Hamilton*, 11 Jurist, 574.

(q) *Clinan v. Cooke*, 1 Sch. & Lef. 41, per Lord Redesdale.

(r) *Brodie v. St. Paul*, 1 Ves. 333, per Buller, J.

(s) *Cooth v. Jackson*, 6 Ves. 39, per Lord Eldon.

(t) *Griffith v. Young*, 12 East, 513; *Leaman v. Price*, 2 Bing. 437; 10 Moore, 38, S. C.

(u) See ante, §§ 713, 717, 750.

(v) See *Lord Bolton v. Tomlin*, 5 A. & E. 856; 1 N. & P. 247, S. C.

agreement will not entitle him to recover against the defendant who has omitted to execute his part. This point has recently been determined in the case of *Cocking v. Ward* (*u*). There, the plaintiff sought to recover from the defendant 100*l.* upon a parol contract, under which the plaintiff, in consideration of that sum, had given up her tenancy in a farm, and had procured the defendant to be put into her place. At the trial the defendant's counsel objected, that the agreement, being for the sale of an interest in land, could not be proved by parol testimony; but, for the plaintiff, it was insisted, that as the agreement had been executed, it might be so proved. The question was reserved for the opinion of the Court, who on argument held, that, as the special count was framed upon the contract itself, to enforce payment of the stipulated price of the interest in the land which the plaintiff gave up and to which the defendant succeeded, this contract could not be considered as altogether executed, so long as the defendant's part still remained to be performed; and, consequently, that it must be regarded as a contract within the Statute of Frauds. Feeling, however, that in a moral point of view this decision was most unjust, the Court further held, on the authority of many cases (*v*), and on principle, that, as the defendant had admitted to the plaintiff that he owed her the stipulated price, the amount might be recovered on a count upon an account stated.

§ 758. As the 17th section is confined to contracts for the *sale* of goods, it does not apply to an agreement to procure goods for another and to convey them to a certain place (*x*). With respect to the price, which must be 10*l.* or upwards in order to render a writing necessary, it may be observed, that if a person purchase several articles at one time, though at distinct prices, the transaction will be regarded as one entire contract; and consequently, if the whole purchase-money amounts to 10*l.*, the case will be

(*u*) 1 Com. B. 858. This case appears to overrule *Price v. Leyburn*, Gow's N. P. R. 109, per Dallas, C. J.

(*v*) *Knowles v. Michel*, 13 East, 249; *Highmore v. Primrose*, 5 M. & Sel. 65; *Pinchon v. Chilcott*, 3 C. & P. 236; *Seago v. Deane*, 4 Bing. 459; 1 M. & P. 227, S. C.; *Peacock v. Harris*, 10 East, 104; *Teal v. Auty*, 2 B. & B. 99; 4 Moore, 542, S. C.; *Dynes v. O'Neill*, Cr. & Dix, Abr. Cas. 329.

(*x*) *Cobbold v. Caston*, 1 Bing. 399.

within the statute, though none of the articles taken separately should be of that value (y).

§ 759. The *part acceptance* and *actual receipt* mentioned by the statute has given rise to much litigation; but without entering into any lengthened discussion of the numerous decisions which bear on this point, it may suffice to observe, that the statute means such an acceptance and receipt as precludes the vendor on the one hand, from retaining any lien on the goods (z), and the purchaser on the other, from objecting to their quantity or quality (a). Indeed the question, which must be submitted as one of fact, to the jury is, whether there was a delivery by the vendor, and an actual acceptance and receipt by the vendee, intended by *both parties* to have the effect of transferring the right of possession from the one to the other (b). The mere marking of goods, therefore, by the vendee in the vendor's shop, where they are to be paid for by ready money, will not suffice, as such an act, even when assented to by the vendor, will not deprive him of the right of lien (c). But where a party, having agreed to purchase some wool, had it sent to another warehouse for deposit, and then weighed it, and packed it in his own sheeting, this was held to be a sufficient acceptance, though, by the course of dealing, he was not to remove it to its ultimate place of destination before payment, and no payment had been made. The Court considered, that, under these circumstances, the vendor had not what could properly be called a lien on the wool, but merely a

(y) *Baldey v. Parker*, 2 B. & C. 37; 3 D. & R. 220, S.C. See *Elliott v. Thomas*, 3 M. & W. 170.

(z) *Baldey v. Parker*, 2 B. & C. 37, 44; 3 D. & R. 220, S.C.; *Maberley v. Sheppard*, 10 Bing. 101, 102, per Tindal, C. J.; *Smith v. Surman*, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, S.C.; *Tempest v. Fitzgerald*, 3 B. & A. 680, 684, per Holroyd, J.; *Carter v. Toussaint*, 5 B. & A. 859, per Bayley, J.

(a) *Norman v. Phillips*, 14 M. & W. 283, per Alderson, B.; *Smith v. Surman*, 9 B. & C. 561, 577, per Parke, J.; 4 M. & R. 455, S.C.; *Howe v. Palmer*, 3 B. & A. 321, 325, per Holroyd, J.; *Hanson v. Armitage*, 5 B. & A. 559, per Abbott, C. J.; *Acebal v. Levy*, 10 Bing. 384, per Tindal, C. J.

(b) *Phillips v. Bistolli*, 2 B. & C. 514; recognised in *Maberley v. Sheppard*, 10 Bing. 102.

(c) *Baldey v. Parker*, 2 B. & C. 37; 3 D. & R. 220, S.C.; *Bill v. Bament*, 9 M. & W. 36; *Proctor v. Jones*, 2 C. & P. 532. These cases seem virtually to overrule *Hodgson v. Le Bret*, 1 Camp. 233; and *Anderson v. Scot*, id. 235, (n.)

special interest in it, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the purchaser (*d*). So, where some horses were purchased of a dealer who kept a livery stable, and the buyer directed the seller to keep them at livery, upon which they were transferred from the sale to the livery stable; it was held that this direction was equivalent to an acceptance and receipt of the horses, as the buyer became liable for their keep, which would not have been the case, unless they had actually gone into his possession (*e*). So, where a stack of hay had been purchased by parol, and afterwards the vendee sold part to a third person, who removed it, the jury were held to be justified in concluding that there had been an actual acceptance (*f*).

§ 760. Again, there is no doubt that a person, intrusted with another's goods to sell, may himself become the purchaser by parol, and may do subsequent acts which will amount to an acceptance on his part; as, for instance, if he sells them to a stranger on his own account (*g*).

§ 761. Where the goods are ponderous and incapable of being handed over from one to another, a constructive delivery, such, for example, as the giving up the key of the warehouse where they are deposited, or the delivery of other indicia of property, will be sufficient (*h*). But in all these cases, the acts of the parties, in order to be tantamount to a delivery and actual receipt, must be unequivocal (*i*); and therefore, where goods are lodged with a warehouseman as agent for the vendor, the mere acceptance and retainer by the purchaser of the warrant or delivery order, will not amount to an actual receipt of the goods, so as to bind

(*d*) *Dodaley v. Varley*, 12 A. & E. 632; 2 P. & D. 448, S. C.

(*e*) *Elmore v. Stone*, 1 Taunt. 458; explained and recognised by Bayley, J., in *Smith v. Surman*, 9 B. & C. 570. See *Carter v. Toussaint*, 5 B. & A. 855; 1 D. & R. 515, S. C.

(*f*) *Chaplin v. Rogers*, 1 East, 192; recognised by Bayley, J., in 9 B. & C. 570. See *Stoveld v. Hughes*, 14 East, 308; and *Searle v. Keeves*, 2 Esp. 598.

(*g*) *Edan v. Dudfield*, 1 Q. B. 302; 4 P. & D. 656, S. C.; *Lillywhite v. Devereux*, 15 M. & W. 289, 291.

(*h*) *Chaplin v. Rogers*, 1 East, 195, per Lord Kenyon.

(*i*) *Nicholle v. Plume*, 1 C. & P. 272, per Best, C. J.; *Edan v. Dudfield*, 1 Q. B. 307.

the bargain ; but to have this effect, the document must be lodged by the purchaser with the warehouseman, who must then, as it were, attorn to him, or, in other words, agree to hold the property henceforth as his agent (*i*).

§ 762. One of the chief difficulties in construing this branch of the statute, is where goods, verbally purchased, are delivered to a carrier named by the vendee ; and here it seems to have been once considered, that such delivery was sufficient to satisfy the statute (*k*). However, it has since been held, that though the delivery to the carrier may be a delivery to the purchaser, the acceptance of the carrier is not an acceptance by him (*l*) ; and therefore, where timber, verbally ordered, was forwarded in this manner to the purchaser, but he refused to take it in, the Court of Exchequer held that the jury would not be warranted in finding an acceptance, though an invoice had been sent to the purchaser and retained by him, and though he had omitted to give notice to the vendor of his refusal to take the goods till after the expiration of more than a month (*m*). It is true that, under similar circumstances, the Court of Queen's Bench have pronounced an opposite decision ; but in that case the vendee did not reject the goods for seven months ; and Mr. Justice Coleridge rested his judgment on the ground, that the inspection of the goods was to be made within a reasonable time (*n*). Whether this distinction can be supported is another question ; but be that as it may, thus much is clear,—that if a purchaser, who has the right of approval, retains for an unreasonable time goods which have been delivered to him, he will lose his right to object to them, and his conduct will amount to an acceptance (*o*) ; and further, the

(*i*) *Farina v. Home*, 16 M. & W. 119, 123, per Parke, B. ; *Bentall v. Burn*, 3 B. & C. 423 ; 5 D. & R. 284, S. C.

(*k*) *Hart v. Sattley*, 3 Camp. 528, per Chambre, J. See *Dawes v. Peck*, 8 T. R. 330 ; and *Dutton v. Solomonson*, 3 B. & P. 582.

(*l*) *Johnson v. Dodgson*, 2 M. & W. 656, per Parke, B. See *Acebal v. Levy*, 10 Bing. 376 ; 4 M. & Sc. 217, S. C. ; and *Coats v. Chaplin*, 3 Q. B. 483.

(*m*) *Norman v. Phillips*, 14 M. & W. 277.

(*n*) *Bushel v. Wheeler*, 8 Jurist, 532 ; explained by Alderson, B., in 14 M. & W. 282.

(*o*) *Coleman v. Gibson*, 1 M. & Rob. 168, per Lord Tenterden ; *Norman v. Phillips*, 14 M. & W. 279, per Alderson, B.

same rule will hold, if the goods have been delivered to a general agent of the purchaser, who was authorised by him to examine their quality (*p*).

§ 763. The Statute of Frauds also requires, that *devises of lands or tenements, if executed before the 1st of January, 1838 (q)*, shall be in writing, and signed by the testator, or by some other person in his presence, and by his express direction, and shall be attested and subscribed, in the testator's presence, by three or more credible, that is, competent witnesses (*r*). One main object of these provisions, which have been substantially adopted in most of the United States (*s*), was to prevent the possibility of the witnesses substituting any other instrument for that which the testator gave them to attest (*t*); and, consequently, it has been held, that, to be present, within the meaning of the statute, the testator must be near enough to see and identify the instrument, though, in truth, he may not attempt to do so, and may even not be in the same room (*u*).

§ 764. In favour of attestations the presumption of law is, that if the testator *might* have seen, he *did* see, the witnesses subscribe their names (*x*); and the fact of his having been in the same room is *prima facie* evidence of an attestation in his presence, as an attestation not made in the same room, is

(*p*) *Norman v. Phillips*, 14 M. & W. 283, per Alderson, B.

(*q*) When 7 Will. 4 & 1 Vict. c. 26, came into operation. See post, § 766.

(*r*) 29 Car. 2, c. 3, § 5; 7 Will. 3, c. 12, § 3, Ir.

(*s*) In Vermont alone the will is required to be sealed. Three witnesses are necessary to a valid will, in Vermont, New Hampshire, Maine, Massachusetts, Rhode-Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are requisite, in New York, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, and Kentucky. In some of the States, the provision as to attestation is more special. In Pennsylvania, a devise is good, if properly signed, though it be not subscribed by any attesting witness, provided it can be proved by two or more competent witnesses; and if it be attested by witnesses, it may still be proved by others. 4 Kent, Comm. 514; 6 Cruise's Dig. 44, 46, 47, notes, (3rd Am. edit.)

(*t*) Per Tindal, C.J., in *White v. Trustees of the British Museum*, 6 Bing. 319.

(*u*) *Shires v. Glascock*, 2 Salk. 688; *Carth.* 81, S. C.; 4 Kent, Comm. 515, 516; *Casson v. Dade*, 1 Bro. Ch. C. 99. In the goods of Colman, 3 Curt. Ecc. R. 118.

(*x*) *Todd v. Earl of Winchelsea*, 2 C. & P. 488; M. & M. 12, S. C., per Abbott, C.J.; *Doe v. Manifold*, 1 M. & Sel. 294. For other presumptions respecting the *execution and alteration of wills*, see ante, §§ 105—109.

prima facie not made in his presence (y). It must further appear that the testator, at the time of attestation, was in a state of consciousness; for if he were then insensible, the will is void (z). It is not, however, necessary, either that the witnesses should have attested in the presence of each other, or all at the same time (a), or that they should actually have seen the testator sign, or have heard him acknowledge that the paper was his will, or even have known themselves what the paper was, provided they subscribed the instrument in his presence, and at his request (b). An attestation by a marksman, or by a witness whose hand is guided by another person, is sufficient in point of law (c), though highly injudicious on account of the difficulty of proof in the event of death. In a recent case, a will appeared to be attested by three witnesses. Two of them were dead, and their signatures were proved, but the third was a marksman, who could not be identified. Under these circumstances the Court held, that though the handwriting of the testator and the mark of the third witness were not proved, the jury were warranted in presuming the due execution of the will, as it did not appear to have been disputed for sixteen years after the testator's death (d). In another case, witnesses who had signed by marks were held to be identified, by proof that they had lived near the testator, that no other persons of the same name resided in the neighbourhood, and that they were illiterate people (e).

§ 765. This statute does not require that the testator should *subscribe* the instrument, but it will be sufficient, if the paper be *signed* by him in any part with his name, or mark (f), even though

(y) *Neil v. Neil*, 1 Leigh, R. 6, 10—21, where the cases on this subject are ably reviewed by Carr, J. (z) *Right v. Price*, 1 Doug. 241.

(a) *Cook v. Parsons*, Prec. in Ch. 184; *Jones v. Lake*, 2 Atk. 177, n.; *Grayson v. Atkinson*, 2 Ves. Sen. 455; *Stonehouse v. Evelyn*, 3 P. Wms. 254; *Ellis v. Smith*, 1 Ves. 11; *Hott v. Genge*, 3 Curt. Ec. R. 173; *Dewey v. Dewey*, 1 Metc. 349.

(b) *White v. Trustees of British Museum*, 6 Bing. 310; 3 M. & P. 689, S. C.; *Wright v. Wright*, 7 Bing. 457; 5 M. & P. 316, S. C.; *Johnson v. Johnson*, 1 Cr. & M. 140; 2 Tyr. 73, S. C.; *Hott v. Genge*, 3 Curt. Ec. R. 173; *Dewey v. Dewey*, 1 Metc. 349.

(c) *Harrison v. Harrison*, 8 Ves. 185; *Doe v. Caperton*, 9 C. & P. 112; *Harrison v. Elvin*, 3 Q. B. 117; *Doe v. Davies*, 16 Law J. N. S. Q. B. 97.

(d) *Doe v. Davies*, 16 Law J. N. S. Q. B. 97.

(e) *Doe v. Caperton*, 9 C. & P. 112, per Alderson, B.

(f) *Baker v. Denning*, 8 A. & E. 94; 3 N. & P. 228, S. C. Where a testator

his hand be guided by another person (*g*); provided only that such signature appear to have been made *animo perficiendi*, and to have been regarded by him as a complete execution. Thus, where the will was signed in the margin only,—or where, being written by the testator himself, his name appeared only at the commencement, “I A. B., &c.,”—this was held a good signing (*h*). So, it is sufficient if the will be signed by any person in the testator’s presence, and by his direction, and, in order to constitute a direction, it is not necessary that anything should be said (*i*). Where it appeared that the testator intended to sign each several sheet of the will, but signed only two of them, being unable from extreme weakness to sign the others, it was held incomplete (*k*). We may add, that *direct evidence* of all the requisites specified in the Act is not indispensable to prove the validity of a will; but that the attestation in the presence of the testator, the reality of the signatures of some of the attesting witnesses, the capacity of the testator, or the like, may be presumed from circumstantial evidence, where the omission to give direct testimony is satisfactorily explained (*l*).

§ 766. The *New Will Act* (*m*), which came into operation on the 1st of January, 1838, and which extends to the testamentary papers of domiciled Englishmen, even when made in foreign countries (*n*), has effected extensive amendments in the law respecting these instruments; and it will here be expedient to notice such of the alterations as relate to the *execution of wills*. By this Act, every will, codicil, or other testamentary disposition, including appointments made by will, or by writing in the nature of a will, in exercise of any power (*o*), but excluding nuncupative wills, disposing of personal estate, made by soldiers in actual

has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name; *id.* Sealing a will is not a sufficient signing, *Smith v. Evans*, 1 Wils. 313; *Grayson v. Atkinson*, 2 Ves. Sen. 459, per Lord Hardwicke.

(*g*) *Wilson v. Beddard*, 12 Sim. 28.

(*h*) *Lemaître v. Stanley*, 3 Lev. 1; *Morrison v. Turnour*, 18 Ves. 183. See ante, § 744.

(*i*) *Wilson v. Beddard*, 12 Sim. 33, 34, per V.-Ch.

(*k*) *Right v. Price*, 1 Doug. 241. See *Winsor v. Pratt*, 2 B. & B. 650; 5 Moore, 282, S. C.

(*l*) *Doe v. Davies*, 16 Law J. N. S. Q. B. 98, per Lord Denman, recognising *Croft v. Pawlet*, 2 Stra. 1109; and *Hands v. James*, Com. Rep. 531.

(*m*) 7 Will. 4 & 1 Vict. c. 26.

(*n*) *Croker v. Marq. of Hertford*, 4 Moore, P. C. R. 339.

(*o*) §§ 1 & 10.

military service, or by seamen and mariners at sea (*p*), must, if made, or re-executed, or re-published, or revived by any codicil, on or after the 1st of January, 1838 (*q*), be in writing, "and be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary" (*r*). Appointments by will, if executed in this manner, are valid, although the power, under which they were made, expressly requires some additional solemnity in the execution (*s*); and all wills, executed as above stated, shall be deemed good without other publication (*t*). An exception, indeed, is recognised as to the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, allowances, and monies payable in respect of services in Her Majesty's Navy (*u*); for, with the view of preventing frauds, to which seafaring men are supposed to be more than ordinarily subject, these wills must be drawn, executed, and attested in a more formal manner than instruments made by other persons, who are presumed to have greater experience (*x*).

§ 767. In contrasting these provisions with those contained in the Statute of Frauds, it will be observed, first, that they are not confined, as in the Act of Charles II., to devises disposing of freehold realty, but apply equally to all wills, whether of *freehold*, *copyhold*, or *personal estate*; secondly, that two attesting witnesses are sufficient and necessary in all cases, while the Statute of Frauds required the signature of at least three to all devises of freehold realty, but was silent as to other wills; thirdly, that the testator must make or acknowledge his signature in the *actual cotemporaneous presence* of these witnesses, though this was not necessary under the former act; and fourthly, that the will must be signed

(*p*) § 11. As to nuncupative wills, see 1 Will. on Ex. 82—89.

(*q*) § 34. (*r*) § 9. (*s*) § 10. (*t*) § 13. (*u*) § 12.

(*x*) 11 Geo. 4 & 1 Will. 4, c. 20, §§ 48—50.

"at the foot or end thereof," whereas, in former wills, the signature was valid, if it appeared on any part of the instrument. It has been further laid down as a rule deducible from the spirit, if not from the express language, of the act, that both the attesting witnesses must subscribe the will *at the same time*; and therefore, where a will was signed in the presence of a single witness who then attested it,—and subsequently, the testator, in the presence of this witness and another, acknowledged his signature, whereupon the second witness also subscribed the will,—this was held to be insufficient, though on the second occasion the first witness had acknowledged, but had not retraced, his own signature (*y*). As the word "presence," mentioned in the statute, means not only a bodily, but a mental presence, the act will not be satisfied, if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind or inattentive, at the time when the will is signed or acknowledged (*z*); and so strictly has this rule been interpreted, that where a testator had acknowledged a paper to be his will in the presence of witnesses, but these persons had neither seen him sign it, nor seen his signature at the time of their subscription, a prayer for probate was rejected, though both the witnesses admitted that they had seen the testator writing the paper, and the will, when produced, actually bore his signature (*a*).

§ 768. A somewhat less stringent construction has been put on that part of the act which requires the witnesses to subscribe in the presence of the testator; and in a recent case, where the testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence, the will was admitted to probate (*b*). This distinction has been adopted in consequence of the vast difference which exists in the relative importance of the two acts, and in the objects they are intended to answer. The witnesses are to see the signature made or acknowledged, because they are subsequently to

(*y*) *Moore v. King*, 3 Curteis, 243; in *re Simmonds*, id. 79; in *re Allen*, 2 Curt. 331.

(*z*) *Hudson v. Parker*, 1 Roberts. 24, per Dr. Lushington.

(*a*) *Id.* 14.

(*b*) *Newton v. Clarke*, 2 Curt. 320.

attest it ; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it ; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act, they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign (c).

§ 769. In enacting that the testator must "make or acknowledge" his signature in the presence of witnesses, the Legislature did not intend to confine the acknowledgment to cases where the signature was made "by some other person" than the testator, but meant it to apply equally to those cases where the signature had been previously made by himself (d). In making the acknowledgment, it is not necessary that the testator should actually point out to the witnesses his name, and say "that is my name or my handwriting ;" but if he states that the whole instrument was written by himself (e), or if he produces a paper as his will, and requests the witnesses to put their names *underneath his* (f), or even, it seems, if he shows a paper in his handwriting to the witnesses and desires them to sign it, without stating that such paper is his will (g), this will be a sufficient acknowledgment of his signature, provided it clearly appears that, at the time of making the statement or producing the document, the signature was really affixed, and was actually seen by the witnesses when they signed at the testator's request. Unless, however, the judge is satisfied that the witnesses, before they subscribed the will, either saw the testator sign it, or saw his signature attached to it, he must pronounce against its validity ; for the statute requires, not that the *will*, but that the *signature*, should be attested (h). It follows from this rule, that if the witnesses sign before the testator the will is void, though the testator immediately afterwards

(c) *Hudson v. Parker*, 1 Roberts. 35, 36, per Dr. Lushington.

(d) *In re Cornelius Ryan*, 1 Curt. 908, recognised in *Ilott v. Genge*, 3 Curt. 174.

(e) *Blake v. Knight*, 3 Curt. 563.

(f) *Gaze v. Gaze*, 3 Curt. 451.

(g) *Keigwin v. Keigwin*, 3 Curt. 607 ; in *re Ashmore*, id. 758, per Sir H. J. Fust.

(h) *Hudson v. Parker*, 1 Roberts. 14 ; *Ilott v. Genge*, 3 Curt. 175, 181 ; *Coun-
teas de Zichy Ferraris v. Marq. of Hertford*, 3 Curt. 479.

affixes his signature in their presence, and though they subsequently seal the document (i).

§ 770. But it is not absolutely essential to the validity of a will, that positive affirmative evidence should be given by the subscribing witnesses, that the testator either signed or acknowledged the signature in their presence, since the Court may *presume due execution* under the circumstances. Thus, where three years after the supposed execution, the witnesses deposed that they went to the house of the deceased, who, as writer to an attorney, was presumed to be conversant with business, to see him sign his will; that he then produced a paper, telling them that it was his will and in his handwriting; that he read over the attestation clause, and the introductory words, and pointed out a mistake which had been rectified in the body of the instrument; that he did not sign in their presence; that when they attested the paper there was no seal upon it, but they could not positively swear that there was no signature; Sir Herbert Jenner Fust granted probate, though the will, when produced, was not only signed but sealed (k). So, also, if the will contains an attestation clause, and purports to be duly signed by the testator and two witnesses, the Court will *prima facie* presume, in the absence or death of the witnesses, or in the event of their not remembering the facts attendant on the execution, that the statute has been complied with, and that *omnia rite esse acta* (l).

§ 771. It was at one time thought, that the clause requiring the testator to sign "at the foot or end" of the testament would be satisfied, though the will itself were wholly written on the first side of a sheet of paper, and the attestation and signature were attached to the second, or even the third side (m). Of late, however, the Act has been construed more strictly; and although it is still not absolutely necessary that the attestation clause should follow the end of the will *without any interval*, yet the fact of there

(i) In *re Byrd*, 3 Curt. 117; in *re Olding*, 2 id. 865; *Cooper v. Bockett*, 3 id. 648; 4 Moore, P. C. R. 419, S. C. (k) *Blake v. Knight*, 3 Curt. 547, 562.

(l) *Burgoyne v. Showler*, 1 Roberts. 5, per Dr. Lushington.

(m) In *re Gore*, 3 Curt. 758; in *re Carver*, id. 29.

being an intervening space will be regarded with suspicion; and if it be coupled with other doubtful circumstances,—as, for instance, if the will do not dispose of the residue or appoint executors, or if it otherwise appear to be incomplete; or if the witnesses did not see the will when they attested it, and cannot speak to its being in the same state then as afterwards,—the Court will, in general, feel constrained to refuse probate (*m*). Where the attestation clause, which was in the handwriting of the testator, ran thus:—“Signed as the will of me, A. B., in the presence, &c.,” this was held to be a sufficient signature at the end of the will (*n*).

§ 772. Under the New Will Act, as under the Statute of Frauds, the testator may sign by his mark only, though his name does not appear in the body of the will (*o*); and the attesting witnesses may also sign as marksmen; and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other (*p*). Again, one of the two attesting witnesses may sign for the testator by his direction (*q*); and where the drawer of a will, being requested by the testator to sign for him, put *his own* signature to the instrument, this was held to be sufficient, as the act does not say that the signature must bear the testator's name (*r*). We may add, with regard to the incorporation of papers in wills, that here, as in other documents, a paper imperfect in itself may, by *clear reference*, be so identified with an instrument validly executed as to form part of it, and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured (*s*).

§ 773. With respect to § 11, which excepts from the operation of the act, all wills of personal estate made by “any soldier being in actual military service, or any mariner or seaman being at sea,”

(*m*) *Willis v. Lowe*, 11 Jurist, 807, per Sir H. J. Fust; *Ayres v. Ayres*, id. 417, per id. (n) *In re Woodington*, 2 Curt. 324.

(*o*) *In re Bryce*, 2 Curt. 325. See ante, § 765.

(*p*) *Harrison v. Elvin*, 3 Q. B. 117. See ante, § 764.

(*q*) *Smith v. Harris*, 1 Roberts. 262; *in re Bailey*, 1 Curt. 914.

(*r*) *In re Clark*, 2 Curt. 329.

(*s*) *Countess de Zichy Ferraris v. Marq. of Hertford*, 3 Curt. 493, per Sir H. J. Fust; *in re Lady Durham*, id. 57; *in re Dickens*, id. 60; *in re Willerford*, id. 77; *Habergham v. Vincent*, 2 Ves. 204. See ante, § 742.

it has been determined, first, that the word "soldier" includes all officers and common soldiers in the employ of the East India Company, as well as those in her Majesty's service (*t*); secondly, that the privilege, as to soldiers, is confined to such as are actually *on an expedition*; and consequently that officers quartered with their regiments in barracks, or otherwise forming part of a stationary force, whether at home or in the colonies, are not within the exception (*u*); thirdly, as to seamen, that the purser of a man-of-war is included in that term (*x*); but, fourthly, that the exception does not extend to an admiral in command of a fleet in the colonies, who lives with his family on shore at his official residence (*y*).

§ 774. Under the Statute of Frauds, the *express revocation* of a will devising freehold lands or tenements, if effected before the 1st January, 1838, must be proved, either by the production of some subsequent will or codicil inconsistent with the former, or of some other writing declaring the revocation, and signed in the presence of three witnesses; or by evidence of burning, tearing, cancelling, or obliterating the will by the testator, or in his presence, and by his direction and consent (z). It is observable that this part of the statute requires that the instrument of revocation should be signed by the testator in the presence of the witnesses, though this was not necessary in executing the will itself; but it does not require, as in the execution of a will, that the witnesses should sign in the testator's presence (a).

§ 775. This statute left the law of *implied revocations* untouched; and, consequently, a devise of real estate by an unmarried man, equally with his will of personalty, was, previously to the New Will Act, revoked by marriage and the birth of a child, whether the birth took place in the testator's lifetime or after his decease (b).

(t) *Shearman v. Pyke*, cited 3 Curt. 539—542.

(u) *Drummond v. Parish*, 3 Curt. 522, 542; in re *Hill*, 1 Roberts. 276; *White v. Repton*, 3 Curt. 818. (x) In re *Hayes*, 2 Curt. 338.

(x) *In re Hayes*, 2 Curt. 338.

(y) *Lord Euston v. Lord Hy. Seymour*, cited 2 Curt. 339, and recognised in *Drummond v. Parish*, 3 Curt. 530.

(z) 29 Car. 2, c. 3, § 6; 7 Will. 3, c. 12, § 3, Ir.

(a) *Onions v. Tyrer*, 1 P. Wms. 343.

(b) Christopher v. Christopher, 4 Burr. 2171 (n), 2182 (n); Doe v. Lancashire, 5 T. R. 49.

But this rule only applied where the will disposed of the whole estate, and left the wife and child entirely without provision (c); and if the testator was a widower, and his will was in favour of the children of his former marriage, then his subsequent marriage and the birth of issue unprovided for, revoked only so much of the will as related to *personalty*, and left that part which disposed of the *land* unaffected; because in such a case the revocation of the devise as to realty would operate only to let in the heir, and the afterborn children would derive no benefit (d). In order to prevent the revocation of the will under the circumstances above stated, it was not sufficient that a provision should have been made for the *wife only*, but such provision must also have extended to the children of the marriage (e). As the rule in question was not founded on any implied intention of the testator to revoke his will in consequence of the altered circumstances of his family, but was the consequence of a condition tacitly annexed by law to the execution of a will, that in the event of a total change taking place in the situation of the testator's family, it should become void, it followed that in courts of law at least, whatever doctrine might prevail in the ecclesiastical courts, no evidence of intention could be admitted to rebut the presumptive revocation (f).

§ 776. Returning to the acts of revocation mentioned by the statute, it is not intended to discuss them at any length, because as the new system has now been in operation for a considerable number of years, it is not very probable that questions relating to the revocation of wills under the old system will in future often be raised. However, we may advert to two cases which strikingly illustrate the defects of the former law. A testator, much under

(c) *Kenebel v. Scrafton*, 2 East, 530, 541; *Brady v. Cubitt*, 1 Doug. 39, 40; *Ex parte Lord Ilchester*, 7 Ves. 348.

(d) *Sheath v. York*, 1 Ves. & Bea. 390.

(e) *Marsden v. Roe d. Fox*, 8 A. & E. 14, 60, 61.

(f) *Id.* In this case, which was decided by all the judges, except Lord Denman, Tindal, C. J., thus lays down the law:—"In the case of the will of an unmarried man having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operates as a revocation." p. 60.

the influence of his niece, who lived with him as housekeeper, left her by his will some freehold and copyhold estates. The parties frequently quarrelled, and on one occasion, when irritated, the testator threw the will upon the fire, but the devisee rescued it without his knowledge, at which he expressed his displeasure when informed of it. The envelope was partially burnt, but the will itself was not so much as singed. The devisee kept it till after the testator's death, when two actions of ejectment were brought against her by the son-and-heir of the testator. In the first, by which the lessor of the plaintiff sought to recover the freehold property, the Court held that there had been no revocation sufficient to satisfy the Statute of Frauds, which rendered a burning of the will itself, at least to some extent, necessary (*g*); but in the second, which related to the copyhold estate, and which, consequently, was not governed by the statute, it was determined that the revocation was complete, inasmuch as a revocation at common law only required evidence of intention, and that evidence might be found in an imperfect act, or a mere attempt (*h*). The result, of course, was, that the lessor of the plaintiff failed in the first case, but succeeded in the last.

§ 777. A law that could warrant decisions thus flagrantly inconsistent was in no slight want of amendment; and the New Will Act, by placing the revocation of *all* wills on the same footing, has effectually remedied this particular evil. The Act further provides, with respect to revocation, "that every will made by a man or woman shall be *revoked* by his or her *marriage*, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions (*i*); and "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances" (*k*); and "that no will, or codicil, or any part thereof shall be revoked otherwise than as aforesaid, or by another will or

(*g*) *Doe v. Harris*, 6 A. & E. 209; 1 N. & P. 405, S. C.

(*h*) *Doe v. Harris*, 8 A. & E. 1, 12.

(*i*) 7 Will. 4 & 1 Vict. c. 26, § 18.

(*k*) § 19.

codicil executed in manner hereinbefore required (*l*), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same" (*m*).

§ 778. In order to revoke a former will by a later one, it is not necessary that there should be any revocation clause; but the general rule is, that any paper duly executed, by which the testator disposes of his *whole* property, is a revocation in toto of all previous wills, though such paper contains no appointment of executors (*n*); and where a testator by his "*last will*," in which executors were appointed, disposed of *part* of his personalty, a former will was held to be revoked, though it contained provisions not wholly inconsistent with the latter (*o*). Where a jury found that a second will, which was not produced, contained a different disposition from a former one, "but in what particulars is unknown," the House of Lords, on writ of error, decided that the first will was not revoked (*p*).

§ 779. It is difficult to fix à priori what extent of *burning* or *tearing* will amount to the revocation of a will under the Act of Victoria or the Statute of Frauds. It is clear that under neither statute will the revocation be complete, unless the act of spoliation be deliberately done upon the instrument, animo revocandi. This is expressly rendered necessary by the New Will Act (*q*), and was impliedly required by the statute of Charles (*r*). It is further clear, on general principle, that the declarations of the testator, accompanying the act of spoliation, will be admissible in evidence as explanatory of his intention (*s*). Still the question remains, Must there be a total or substantial burning or tearing of the writing

(*l*) Ante, § 766.

(*m*) § 20.

(*n*) *Henfrey v. Henfrey*, 4 Moore, P. C. R. 29; 2 Curt. 468, S. C. in the court below.

(*o*) *Plenty v. West*, 1 Roberts. 264.

(*p*) *Goodright v. Harwood*, 2 Wm. Bl. 937; 3 Wils. 497, S. C. See *Thomas v. Evans*, 2 East, 488.

(*q*) Ante, § 777.

(*r*) *Bibb v. Thomas*, 2 Wm. Bl. 1044.

(*s*) *Dan v. Brown*, 4 Cowen, 490.

itself, or will the revocation be complete, if, intending to revoke, the testator tears or burns a portion of the paper on which the will is written, but does not destroy or deface any part of the writing (*t*) ? In an old case, the testator having given the will "something of a rip with his hands, and having torn it so as almost to tear a bit off," rumpled it up and threw it into the fire, but a by-stander saved it without his knowledge, before, as it seems, it was at all burnt; the Court held that the revocation was complete (*u*); and a similar decision has been come to in America, where a testator had torn off a superfluous seal (*x*). However, it has since been doubted whether the proof given in the English case was sufficient to satisfy the statute (*y*); and where a testator, being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards he fitted together, and put by, the several pieces, saying he was glad it was no worse; the Court refused to disturb a verdict, by which the jury had found that the act of cancellation was incomplete, as the testator, had he not been stopped, would have gone further in the process of destruction (*z*). The *cutting* out the signature by the testator has been held to effect a revocation of the will, if not under the word "tearing," at least under the terms "or otherwise destroying the same" (*a*).

. § 780. It will be observed that the Act of Victoria, unlike the Statute of Frauds, omits all mention of "*cancelling*" as one of the modes of revoking a will; and with respect to *obliterating*, it enacts, in § 21, "that no obliteration, or interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be *apparent*, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will (*b*); but the will, with such alteration as part thereof, shall be deemed to be duly executed, if

(*t*) See *Doe v. Harris*, 6 A. & E. 215—218; 1 N. & P. 405, S. C.

(*u*) *Bibb v. Thomas*, 2 Wm. Bl. 1043.

(*x*) *Avery v. Pixley*, 4 Mass. 462.

(*y*) *Doe v. Harris*, 6 A. & E. 215, per Lord Denman.

(*z*) *Doe v. Perkes*, 3 B. & A. 489.

(*a*) *Hobbs v. Knight*, 1 Curt. 768.

(*b*) See ante, § 766.

the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will." The word "apparent" here used, does not mean what is capable of being made apparent by extrinsic evidence, but simply applies to what is apparent on the face of the instrument itself; and consequently, if a testator entirely obliterates any part of the will, *animo revocandi*, this will still operate as a revocation of that part, and no evidence dehors the will can be received, in order to show how the defaced passage originally stood (*d*). So, it would seem that the erasure by the testator of his own signature, or of the signature of either or both of the witnesses, if done *animo revocandi*, would amount to a revocation of the whole will, and would in fact be tantamount to its actual destruction (*e*). We have already seen, while treating of the law of presumptions (*f*), that in the absence of any direct evidence, the law will presume that any alteration or erasure in a will was made after its execution; and, consequently, the Courts will grant probate of the will in its original form (*g*).

§ 781. It has further been determined, notwithstanding the language of § 34 (*h*), that the provisions of the New Will Act with respect to the revocation or alteration of wills, apply equally to all wills, whether executed before or after the 1st of January, 1838, provided the act of assumed revocation has been done, or the alteration has been made, after that date (*i*). Although § 21, cited above (*j*), does not expressly state, that, to effect a revocation of the will or of any part of it, the erasure or obliteration must be made with that *intention*, yet the Court has held that here, as under the Statute of Frauds, the *animus revocandi* is indispensable; and therefore, where a testator had erased the amount of a legacy,

(*d*) *Townley v. Watson*, 3 Curt. 761, 764, 768, 769.

(*e*) *Hobbs v. Knight*, 1 Curt. 780, 781, per Sir H. J. Fust. (*f*) *Ante*, § 109.

(*g*) *Cooper v. Bockett*, 4 Moore, P. C. R. 419. (*h*) See *ante*, § 766.

(*i*) *Hobbs v. Knight*, 1 Curt. 768, 774—776; *Countess de Zichy Ferraris v. Marq. of Hertford*, 3 Curt. 468; *Brooke v. Kent*, 3 Moore, P. C. R. 334; 2 Curt. 343, S. C. nom. in re *Brooke*; *Croker v. Marq. of Hertford*, 4 Moore, P. C. R. 339; *Andrews v. Turner*, 3 Q. B. 177. (*j*) *Ante*, § 780.

and had inserted a smaller sum, but the alteration, not having been duly executed, took no effect, the Court decreed probate of the will in its original form, as it was clear that the testator intended only a *substitution*, and not a revocation, of the bequests altered (*k*). What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all, and the erasure is treated as an act done by mere mistake, *sine animo cancellandi* (*l*).

§ 782. With respect to the *revival* of wills, the statute of Victoria enacts, "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown" (*m*). Thus the destruction of the revoking instrument is no longer sufficient to revive a former will (*n*); and the question of revival or non-revival from this cause, which under the old system was made to depend on the intention of the testator, as gathered from the circumstances of each particular case (*o*), can never again arise, excepting in the event of a second will having been revoked previously to the 1st of January, 1838.

§ 783. The next important statute, to which it is necessary to refer, is the one generally known as Lord Tenterden's Act (*p*). The first section, which has already been set out and partially

(*k*) *Brooke v. Kent*, 3 Moore, P. C. R. 334, 349, 350; *Burtenshaw v. Gilbert*, 1 Cowp. 52, per Lord Mansfield; *Onions v. Tyrer*, 1 P. Wms. 343.

(*l*) *Locke v. James*, 11 M. & W. 901, 910, 911, per Parke, B.

(*m*) 7 Will. 4 & 1 Vict. c. 26, § 22. See *Andrews v. Turner*, 3 Q.B. 177.

(*n*) *Major v. Williams*, 3 Curt. 432.

(*o*) *James v. Cohen*, 3 Curt. 782, per Sir H. J. Fust, citing *Usticke v. Bawden*, 2 Add. 125.

(*p*) 9 Geo. 4, c. 14.

discussed in the Chapter *On Admissions* (q), provides generally, that in actions of debt or upon the case, grounded on any simple contract, no case shall be taken out of the Statute of Limitations, except by *acknowledgment* or *promise in writing* to be *signed by the party chargeable thereby*, or by part payment. Considering the endless variety of language in which acknowledgments of debts may be couched, it is obviously impossible to lay down distinct rules of interpretation, by following which the Court (r) will be enabled to arrive at a sound decision in each particular case. Much must, under any circumstances, be left to discretion; yet still that discretion may be materially guided by attending to the following propositions, which appear to be warranted by the most recent decisions. First, the legislature, in passing the Act, did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. The inquiry, therefore, whether in a given case the written document amounts to an acknowledgment or promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation (s). Secondly, in order to take a case out of the operation of the statutes, the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and *unqualified* admission of a still subsisting liability, from which a promise to pay *on request* will be implied by law (t). Thirdly, a *conditional promise*, in the absence of proof of the fulfilment of the condition, will not suffice; but if such proof be afforded, the promise, whether express or implied, will be

(q) Ante, § 528.

(r) That this is a question for the Court, and not for the jury, see ante, § 34.

(s) *Haydon v. Williams*, 7 Bing. 166, 167, per Tindal, C. J.; 4 M. & P. 811, S. C.

(t) *Morrell v. Frith*, 3 M. & W. 405, per Parke, B.; *Bucket v. Church*, 9 C. & P. 212, per id.; *Tanner v. Smart*, 6 B. & C. 609, per Lord Tenterden; *Brigstocke v. Smith*, 1 Cr. & Mee. 486, per Bayley, J.; *Hart v. Prendergast*, 14 M. & W. 741, 745, 746. In this case *Alderson, B.*, questioned *Gardner v. M'Mahon*, 3 Q. B. 561; 2 G. & D. 593, S. C.

converted into an absolute one, and as such will support a declaration averring a promise to pay on request (*u*).

§ 784. Fourthly, since a mere acknowledgment of a debt, which does not amount in law to an implied promise to pay, will not take the case out of the Statute of Limitations, it seems to follow, though several authorities throw some doubt on the subject (*x*), that an admission to a *stranger* that a sum is due will not suffice (*y*); but the question is still undecided, whether an acknowledgment by the maker of a promissory note to the payee, of the existence of a debt due thereon, can be made available to defeat the Statutes of Limitations by a subsequent holder of the note, as amounting to a promise to pay the note according to its tenor and effect, that is, to the payee or his order (*z*). Fifthly, a general written promise to pay, not specifying any amount, or an absolute admission of *some* debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence; but if no proof be given on this head, the plaintiff will be entitled merely to nominal damages (*a*). Sixthly, the promise or acknowledgment in writing need not specify either the person to whom, or the time when, it was made, but both these points may be established by parol evidence (*b*). Seventhly, the promise, acknowledgment, or part payment, must be made before action brought, inasmuch as they severally bar the statutes, not as was formerly supposed, upon the ground of their rebutting the presumption of payment, but because they amount to a new

(*u*) *Humphreys v. Jones*, 14 M. & W. 1, 3; *Hart v. Prendergast*, id. 745, 746.

(*x*) See *Clark v. Hooper*, 10 Bing. 481, per Tindal, C. J., and Park, J.; 4 M. & Scott, 353, S. C.; *Eicke v. Nokes*, 1 M. & Rob. 359, per Tindal, C. J.; *Peters v. Brown*, 4 Esp. 46, per Lord Kenyon; *Smith v. Poole*, 12 Sim. 17.

(*y*) *Grenfell v. Girdlestone*, 2 You. & Coll. Ex. R. 676, per Alderson, B.

(*z*) *Cripps v. Davis*, 12 M. & W. 159; *Mountstephen v. Brooke*, 3 B. & A. 141.

(*a*) *Spong v. Wright*, 9 M. & W. 633, per Alderson, B.; *Lechmere v. Fletcher*, 1 Cr. & Mee. 623; 3 Tyr. 450, S. C.; *Chealyn v. Dalby*, 4 You. & Coll. Ex. R. 238; *Waller v. Lacy*, 1 M. & Gr. 54, 71; 8 Dowl. 563; 1 Scott, N. R. 186, S. C.; *Dickinson v. Hatfield*, 1 M. & Rob. 141, per Lord Tenterden; 5 C. & P. 46, S. C.; *Bewley v. Power*, Hayes & Jon. Ex. R. Ir. 368. These cases overrule the dicta of the Court in *Kennett v. Milbank*, 8 Bing. 38. See *Hartley v. Wharton*, 11 A. & E. 934; 3 P. & D. 529, S. C.

(*b*) *Hartley v. Wharton*, 11 A. & E. 934; 3 P. & D. 529, S. C.; *Edmunds v. Downes*, 2 Cr. & Mee. 459; 4 Tyr. 173, S. C. See also *Lobb v. Stanley*, 5 Q. B. 574.

promise (c). Lastly, the promise proved, whether express or implied, must correspond with that laid in the declaration (d); and therefore, an acknowledgment made to or by an executor or administrator will not support a count laying the promise to or by the testator or intestate (e); and where an action was brought against a man and his wife and a third person, on a joint note made by the third person and the lady before her marriage, an acknowledgment by the third person after the marriage of the lady, was held not to support an issue joined on the Statute of Limitations, the promise laid in the declaration being by the third person and the lady before her marriage (f).

§ 785. In accordance with the second and third rules stated above, letters, in substance as follows, have been held insufficient, as not amounting to *unqualified acknowledgments*. "I intend to pay A.'s claim if allowed time; if I am proceeded against, any exertion of mine will be rendered abortive" (g);—"I have been expecting to be able to give a satisfactory reply to your application respecting B.'s demand against me. I will call upon you to-morrow on the matter" (h);—"I will have nothing to do with your claim; you can make me a bankrupt, but I had rather go to gaol than pay you" (i);—"I owe the money, but I will never pay it" (k);—"I will not fail to meet you on fair terms, and hope, within perhaps a week, to be able to pay you at all events a portion of the debt, when we shall settle about the liquidation of the balance" (l);—"I send you an account of some debts due to me; collect them, and pay yourself, and you and I shall then be clear" (m);—"Arrangements have been made to enable me to discharge your

(c) *Bateman v. Pinder*, 3 Q. B. 574, overruling *Yea v. Fouraker*, 2 Burr. 1099.

(d) *Tanner v. Smart*, 6 B. & C. 608, 609, per Lord Tenterden; 2 Saund. R. 63 l. 64; *Cripps v. Davis*, 12 M. & W. 167, per Parke, B.

(e) *Sarell v. Wine*, 3 East, 409; *Browning v. Paris*, 5 M. & W. 120, per Parke, B.; *Tanner v. Smart*, 6 B. & C. 608, 609.

(f) *Pittam v. Foster*, 1 B. & C. 248; 2 D. & R. 363, S. C.

(g) *Fearn v. Lewis*, 6 Bing. 349; 1 M. & P. 1, S. C.

(h) *Morrell v. Frith*, 3 M. & W. 402; 8 C. & P. 246, S. C.

(i) *Linsell v. Bonsor*, 2 Bing. N. C. 241; 2 Scott, 399, S. C.

(k) *A'Court v. Cross*, 3 Bing. 329.

(l) *Hart v. Prendergast*, 14 M. & W. 741.

(m) *Routledge v. Ramsay*, 8 A. & E. 221; 3 N. & P. 319, S. C.

debt; funds have been appointed for that purpose, of which A. is trustee, and to him I refer you for further information" (n);—"Send me in any bill or demand you have to make on me, and, if just, I shall not give you the trouble of going to law" (o);—"I will not pay your demand, for it is of more than six years' standing" (p).

§ 786. So, the following *conditional acknowledgments* have been deemed insufficient, in the absence of proof that the condition has been fulfilled:—"I cannot pay the debt now, but I will as soon as I can" (q);—"We are waiting a remittance from Liverpool against beef we sent to sell; when it comes, we shall send you the amount of the bill" (r);—"I shall be most happy to pay you principal and interest as soon as convenient" (s).

§ 787. On the other hand, cases have been taken out of the operation of the statutes, when the letters, in substance, contained such expressions as the following:—"I can never be happy till I have paid you; your account is correct, and would that I were now going to inclose the amount" (t);—"I wish I could comply with your request, for I am anxious to pay your bill. I hope that out of the present harvest it will be paid; if not, the concern must be broken up to meet it" (u);—"I am in your debt, and will not avail myself of the statute; but we do not agree as to the amount, and until this be ascertained I cannot move a step towards giving you satisfaction, and doing justice to my other creditors" (x);

(n) *Whippy v. Hillary*, 3 B. & Ad. 399; 5 C. & P. 209, S. C. This case overrules *Baillie v. Lord Inchiquin*, 1 Esp. 435, as the Court admitted in *Routledge v. Ramsay*, 8 A. & E. 223, 224. (o) *Spong v. Wright*, 9 M. & W. 629.

(p) *Brigstocke v. Smith*, 1 Cr. & Mee. 483; 2 Tyr. 445, S. C.; *Coltman v. Marsh*, 3 Taunt. 380.

(q) *Tanner v. Smart*, 6 B. & C. 603; 9 D. & R. 549, S. C.; *Haydon v. Williams*, 7 Bing. 167, per Tindal, C. J.; *Ayton v. Bolt*, 4 Bing. 105; *Gould v. Shirley*, 2 M. & P. 581. (r) *Hodgens v. Graham*, 1 Alc. & Nap. 49.

(s) *Edmunds v. Downes*, 2 Cr. & Mee. 459; 4 Tyr. 173, S. C.

(t) *Dodson v. Mackey*, 8 A. & E. 225 (n); 4 N. & M. 327, S. C.

(u) *Bird v. Gammon*, 3 Bing. N. C. 883; 5 Scott, 213, S. C.

(x) *Gardner v. M'Mahon*, 3 Q. B. 561; 2 G. & Dav. 593, S. C. This case was questioned by *Alderson, B.*, in *Hart v. Prendergast*, 14 M. & W. 746. See *Bewley v. Power*, *Hayes & Jon. Ex. Ir.* 368.

—“Your demand is not just; I am not in your debt anything like 90*l.*; I will settle the difference when we meet” (*y*);—“I have received your letter” [which stated that some items in the bill sent with it were of more than six years’ standing]; “P. will attend for me to tax your costs, and one will then know what to pay, the other what to receive” (*z*);—“I send you my account, leaving a blank for the counter demand you have on me, and beg that you will favour me with the balance” (*a*);—“I will at any time pay my proportion of the joint debt” (*b*);—“I cannot comply with your request yet; the best way for you will be to send me the bill you hold, and draw another for 30*l.*, the balance of your money” (*c*).

§ 788. In order to take a case out of the Statute of Limitations by a *part payment*, it must appear that the payment was made, not only on account of a debt, but *on account of the debt* for which the action is brought; and therefore, if there be two undisputed debts, a part payment within six years, not specifically appropriated, will not, as it seems, bar the statute as to either debt (*d*). Moreover, it must appear that the payment was made in *part* discharge of the debt declared on; for the meaning of *part payment* is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it (*e*). The reason why the effect of such a payment is left untouched by Lord Tenterden’s Act appears to be, that it is an

(*y*) *Colledge v. Horn*, 3 Bing. 119; 10 Moore, 431, S. C.

(*z*) *Murphy v. Meredith*, 5 Ir. Law R. 120. Held, that this was not a conditional acknowledgment, on which the plaintiff could only recover on proof of taxation of costs.

(*a*) *Waller v. Lacy*, 1 M. & Gr. 54; 1 Scott, N. R. 186; 8 Dowl. 563, S. C.

(*b*) *Lechmere v. Fletcher*, 1 Cr. & Mee. 623; 3 Tyr. 450, S. C.

(*c*) *Dabbs v. Humphries*, 10 Bing. 446. The older authorities are not here referred to, as few of them are law. They will be found noticed in 2 St. Ev. 662—667, and in Roscoe, Ev. 318—321.

(*d*) *Burn v. Boulton*, 2 Com. B. 476.

(*e*) *Tippets v. Heane*, 1 C. M. & R. 252; 4 Tyr. 772, S. C.; *Waters v. Tompkins*, 2 C. M. & R. 723; Tyr. & Gr. 137, S. C.; *Waugh v. Cope*, 6 M. & W. 824, 829. *Now over the circumstances must be such as to warrant the jury in inferring a promise to pay,*

and therefore, if part payment be accompanied by a positive refusal to pay the remainder, it will not take the case out of the statute, though the debtor admits that the remainder is due. Mainman v. Hyman 1 Ex. R. 148.

admission evidenced by an *act*, and as such not so liable to misinterpretation or mistake as a *mere* acknowledgment by *words* (*f*). It has been urged that, on the same ground, the sale and delivery of goods, which, equally with the payment of money, are acts done, should be exempted from the operation of Lord Tenterden's Act; but the answer is that, however this may be in theory, the statute in fact contains no exception in favour of the sale or delivery of goods. Such acts, therefore, are not sufficient to take a case out of the Statute of Limitations, unless under circumstances which would render the delivery equivalent to payment (*g*); as, for instance, if it were expressly agreed between the parties, that the goods delivered by the one should be taken by the other in part payment of the sum due to him (*h*).

§ 789. Neither will the existence of *items* within six years in an *open account*, operate to take the previous portion of the account out of the Statute of Limitations, but there must be an actual part payment in cash, or something equivalent to it (*i*). Moreover, if in a continuous account some items have accrued before, and others within, the six years, the mere payment of a sum by the debtor, without any evidence of an appropriation on his part, or of an intention to apply such sum in part discharge of the earlier items, will not have the effect of exempting them from the operation of the Statute of Limitations; though, in such case, the creditor may at any time apply the payment to the debts that have been due for a longer period than six years (*k*). It has been held in one case, that the going through an account with items on both sides, and striking a balance, was an act equivalent to part

(*f*) *Waters v. Tompkins*, 2 C. M. & R. 726, per Parke, B.

(*g*) *Cottam v. Partridge*, 4 M. & Gr. 271, 287—289, 291—293; 4 Scott, N. R. 819, S. C.; overruling *Catling v. Skoulding*, 6 T. R. 189, as only applicable to the state of the law previous to the passing of Lord Tenterden's Act. See also *Williams v. Griffiths*, 2 C. M. & R. 46, 47, per Parke, B.

(*h*) *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stephens*, 4 A. & E. 71; 7 C. & P. 260, S. C.

(*i*) *Cottam v. Partridge*, 4 M. & Gr. 271; 4 Scott, N. R. 819, S. C.; *Williams v. Griffiths*, 2 C. M. & R. 45; 5 Tyr. 748, S. C.; *Mills v. Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444, S. C.; *Waller v. Lacy*, 1 M. & Gr. 54, 75; 1 Scott, N. R. 186, S. C.

(*k*) *Mills v. Fowkes*, 5 Bing. N. C. 455; 7 Scott, 444, S. C.

payment ; the apparent ground of the decision being, that such a proceeding converted the *set-off* into *payments*, and raised a new consideration for the liquidation of the balance (*l*). Be this as it may, the doctrine will not apply to a case where the account contains items on one side only (*m*), for it will then be no more than a mere parol statement of, and promise to pay, an existing debt ; and to hold such a statement of account to be sufficient, would be to repeal the statute (*n*).

§ 790. Though the payment, in order to take the case out of the operation of the statute, may be either of principal or of interest, yet if the debt be made up of sums due on both these accounts, the payment of the principal will raise no implied promise to pay the interest, at least, if accompanied by a refusal to pay it (*o*) ; but the payment of interest barred by the statute, though it does not necessarily prove that the principal money is due, is some evidence of that fact (*p*) ; and if coupled with other circumstances, as for instance, if the interest was due upon a note, which was allowed to remain in the hands of the payee, the payment of that interest might fairly be regarded as a sufficient acknowledgment of the currency of the note, to revive the claim for the principal (*q*). Where a bill is drawn in part payment of a debt, and is paid when due, it operates to defeat the statute from the time, not of its payment, but of its delivery to the creditor (*r*) ; but this rule, if sound, seems to rest rather on the ground that the bill is an acknowledgment in writing signed by the party chargeable, than that the making and delivery of the bill amount to part payment (*s*).

§ 791. With respect to the mode of proving the *fact* of payment,

(*l*) *Ashby v. James*, 11 M. & W. 542.

(*m*) *Id.* 543, 544, per Alderson, B., apparently overruling *Smith v. Forty*, 4 C. & P. 126, per Vaughan, B.

(*n*) *Jones v. Ryder*, 4 M. & W. 32 ; *Reeves v. Hearne*, 1 M. & W. 323 ; *Hopkins v. Logan*, 5 M. & W. 248, per Parke and Alderson, Bs. ; *Clark v. Alexander*, 8 Scott, N. R. 147.

(*o*) *Collyer v. Willock*, 4 Bing. 313.

(*p*) *Purdon v. Purdon*, 10 M. & W. 562.

(*q*) *Bealy v. Greenslade*, 2 Cr. & Jer. 61.

(*r*) *Irving v. Veitch*, 3 M. & W. 90 ; *Gowan v. Foster*, 3 B. & Ad. 507.

(*s*) *In re Harries*, 13 M. & W. 3.

the Courts have put a somewhat forced, though salutary, construction on Lord Tenterden's Act, and have held that this fact cannot be established by *any admission* of the debtor, short of an acknowledgment in writing signed by him (*t*). However, when the fact of payment has been legally proved, the parol admissions of the debtor, whether made before, or after, or at the time of payment, are clearly admissible for the purpose, either of showing on what account the payment was made, or of corroborating the direct proof of the fact of payment (*u*). Though there must be reasonable evidence of the identity of the debt, on account of which payment was made, with that which forms the subject-matter of the action (*x*), the jury will be warranted in inferring such identity, in the absence of any proof of more debts than one being acknowledged to be due (*y*).

§ 792. Section 5 of the same statute enacts, "that no action shall be maintained, whereby to charge any person upon any *promise made after full age to pay any debt contracted during infancy*, and upon any ratification after full age of any promise or simple contract made during infancy, unless such *promise or ratification* shall be made by *some writing signed by the party to be charged* therewith." The ratification under this section, like the acknowledgment under the first, will be valid, though it contains no date, and does not specify the amount of the debt or the creditor's name; for all these points may be established by oral testimony (*z*). An account stated by an infant may, equally with any other contract he may have entered into, be ratified by him after

(*t*) Bayley v. Ashton, 12 A. & E. 493; 4 P. & D. 204, S. C.; Willis v. Newham, 3 Y. & Jer. 518; Maghee v. O'Neil, 7 M. & W. 531; Eastwood v. Saville, 9 M. & W. 615.

(*u*) Waters v. Tompkins, 2 C. M. & R. 723; Tyr. & Gr. 137, S. C.; Bevan v. Gething, 3 Q. B. 740; 3 G. & D. 59, S. C.; Edan v. Dudfield, 1 Q. B. 307, 308, per Lord Denman.

(*v*) Waters v. Tompkins, 2 C. M. & R. 727, per Parke, B.

(*y*) Evans v. Davies, 4 A. & E. 840; 3 N. & P. 464, S. C.; Burn v. Boulton, 2 Com. B. 476. As to the law, where payment is made by one of several joint debtors, see ante, §§ 526—529.

(*z*) Hartley v. Wharton, 11 A. & E. 934; 3 P. & D. 529, S. C.; ante, § 784. As to the burthen of proof, see ante, § 272.

he attains his full age (*z*) ; but the ratification must, in all cases, be made before the commencement of the suit on the original contract (*a*).

§ 793. Section 6 enacts, "that no action shall be brought, whereby to charge any person upon, or by reason of, any *representation* or assurance made or given concerning or *relating* to the character, conduct, *credit*, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*b*), unless such *representation* or assurance be made in *writing*, signed by the party to be charged therewith." This provision was rendered necessary by the case of *Pasley v. Freeman* (*c*), which afforded ample opportunity for evading the enactment of the Statute of Frauds, requiring that guarantees should be in writing (*d*), by enabling the plaintiff to shape his demand, not upon a *special promise* to answer for the debt or default of another, but upon a *tort* or wrong done to him, by some false or fraudulent representation made by the defendant, in order to induce him to contract with another person. The meaning of the word "ability" mentioned in the section, has been the subject of more than one lengthened discussion in the courts of law. In *Lyde v. Barnard* (*e*), an action was brought against the trustee of Lord Edward Thynne, for falsely representing that Lord Edward's life interest in certain trust property was charged with only three annuities, whereby the plaintiff was induced to purchase an annuity from Lord Edward, secured by his bond, &c., and by an assignment of his interest in the trust fund ; whereas the defendant well knew that the said interest was also charged with a mortgage of 20,000*l*. It appearing at the trial that the representations were by parol, the Court of Exchequer were equally divided on the question, whether they related to the ability of Lord Edward ; Barons Parke and Alderson contending that they

(*z*) *Williams v. Moor*, 11 M. & W. 256 ; overruling a distinction taken by Bayley, J., in *Thornton v. Illingworth*, 2 B. & C. 826.

(*a*) *Thornton v. Illingworth*, 2 B. & C. 824 ; 4 D. & R. 545, S.C. See *Bateman v. Pinder*, 3 Q. B. 574, cited, ante, § 784.

(*b*) The word "upon" is obviously a misprint.

(*c*) 3 T. R. 51.

(*d*) Ante, §§ 738, 746—748.

(*e*) 1 M. & W. 101 ; Tyr. & Gr. 250, S.C. See 1 Smith, Lead. C. 79—81.

simply had reference to the state of the fund; but Lord Abinger and Baron Gurney with apparently more reason holding, that they related to the state of the fund, as an element only of Lord Edward's personal credit, and that substantially the question which they purported to answer, regarded his ability to give security of adequate value. This last opinion is somewhat confirmed by a subsequent decision of the Court of Queen's Bench (*e*). There, an attorney, having falsely represented that his client might be safely trusted, because he had lately purchased an estate, and the title-deeds were in his, the attorney's possession, so that the client could do nothing without his knowledge, the Judges held, that this was a representation respecting the ability of the client, and must therefore be in writing.

§ 794. In order to come within the meaning of the Act, it is not necessary that the action should be brought directly upon the representation; but where a plaintiff sought, in an action for money had and received, to recover the value of goods which he had supplied to a third party on the defendant's representation, and which goods had been sold by the third party, and the proceeds thereof paid over to the defendant, the Court held, that, as the plaintiff's case rested on the misrepresentation alone, it directly fell within the terms of the Act (*f*). Perhaps, had the misrepresentation formed only one link in the chain of fraud, by which the plaintiff had been deprived of his goods, the result might have been different (*g*). The Act also applies to a misrepresentation made by one partner respecting the credit of the firm (*h*).

§ 795. In order to take a case out of the *Real Property Limitation Act* (*i*), the several acknowledgments mentioned therein must all be in writing and duly signed. Thus, under the 14th section, "An acknowledgment of the title of the person entitled to any land or rent," must, to neutralize the effect of his discontinuance of the possession, or of the receipt of the profits, or of rent,

(*e*) *Swann v. Phillips*, 8 A. & E. 457; 3 N. & P. 447, S.C.

(*f*) *Haslock v. Fergusson*, 7 A. & E. 86; 2 N. & P. 269, S.C. (*g*) *Id.*

(*h*) *Devaux v. Steinkeller*, 6 Bing. N.C. 84; 8 Scott, 202, S.C.

(*i*) 3 & 4 Will. 4, c. 27; extended to Ireland by 6 & 7 Vict. c. 54, and 7 & 8 Vict. c. 27. See ante, § 61, n. (*j*).

be “given to him or his agent in writing, signed by the person in possession, or in the receipt of the profits of such land, or in receipt of such rent.” So, under the 28th section, “an acknowledgment of the title of the mortgagor, or of his right of redemption,” must, in order to keep alive his rights, in the event of the mortgagee obtaining the possession or receipt of the profits of any land, or the receipt of any rent, be “given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him.” The 40th section also enacts, that “no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person, capable of giving a discharge for, or release of, the same; unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some *acknowledgment* of the right thereto shall have been given in *writing, signed by the person by whom the same shall be payable, or his agent*, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.” The acknowledgments of title mentioned in this Act should be distinct and unconditional; and, therefore, where a party in adverse possession of land, on being applied to by the person claiming title to it, to pay rent and take a lease, wrote in answer;—“Although, if matters were contested, I think I could establish a legal right to the premises, yet, under all the circumstances, I will accede to your proposal of my paying a moderate rent, on an agreement for a term of twenty-one years;”—it was held, that, as this arrangement was never carried into effect, the letter written with a view to it could not be regarded as an acknowledgment of title, within the meaning of the 14th section of the Act. (*l*).

§ 796. Again, the Act for the Amendment of the Law (*m*), after

(*l*) *Doe v. Edmonds*, 6 M. & W. 295. See *Doe v. Beckett*, 4 Q. B. 601.

(*m*) 3 & 4 Will. 4, c. 42.

enacting that all actions of debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, or of debt or scire facias upon recognizance, must be brought within twenty years after the cause of such actions or suits (*n*), provides, "that if any acknowledgment shall have been made either by *writing signed* by the *party liable* by virtue of such indenture, specialty, or recognizance, or *his agent*, or by part payment or part satisfaction, on account of any principal or interest being then due thereon," the plaintiff may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment (*o*).

§ 797. By the *Prescription Acts*, too, claims to rights of common and other profits à prendre, to rights of way or other easements, to the use of light, to the payment of a modus, or to exemption from tithes, are rendered indefeasible after the lapse of certain defined periods, unless it shall appear that the respective privileges were enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing" (*p*).

§ 798. So, under the bankruptcy laws, no bankrupt, after his certificate has been allowed, is liable to pay any debt, claim, or demand, from which he has been discharged by his certificate, or any part thereof, upon any contract, promise, or agreement made after the fiat, unless it be in writing, signed by him, or by some person (*q*) to whom he has given a *written* authority. Again, the recent Act relating to Merchant Seamen, among other protections which it affords to that thoughtless but deserving class, enacts, that no master of a ship shall carry to sea any seaman, excepting an apprentice, as one of his crew, unless he has first made an agreement with him in writing, which must be properly dated, and be signed first by the master and afterwards by the seaman; and the signature of both parties must be duly attested by at least one witness, in whose presence the master must read over and

(*n*) § 3, set out, ante, § 61, n. (*m*). The Irish Act, 3 & 4 Vict. c. 105, contains a similar provision, in § 32.

(*o*) § 5; and 3 & 4 Vict. c. 105, § 34, Ir.

(*p*) 2 & 3 Will. 4, c. 71, §§ 1, 2, 3, cited ante, § 61, n. (*l*); 2 & 3 Will. 4, c. 100, § 1, cited ante, § 61, n. (*k*).

(*q*) 6 Geo. 4, c. 16, § 131. See *Lobb v. Stanley*, 5 Q. B. 574.

explain the agreement to the seaman before the latter executes it (r). A parol agreement, however, while it renders the master liable to a penalty (s), and is not binding on the seaman, may, it seems, be enforced by the seaman against the master (t). Again, under the Act for Regulating Hackney and Stage Carriages within the Metropolitan Police District, no proprietor of such carriages can enforce the payment of any sum, claimed from any driver or conductor on account of his earnings, unless under an agreement in writing, which shall have been signed by such driver or conductor in the presence of a competent witness (u).

§ 799. By the Act which governs the registration of persons entitled to vote in the election of members of parliament, all notices of objection to persons remaining on the list of voters, must be individually signed at the foot of the notice by the person objecting (x); and if the notice is sent by the post, and the service of it is sought to be established by the production of a duplicate stamped at the Post-office, this duplicate must be personally subscribed in the same manner (y). So, under the same Act, notices of intention to prosecute an appeal, whether transmitted to the master of the Court of Common Pleas, or sent to the respondent, must be signed by the appellant himself (z). Again, all notices of appeal against poor-rates, or against the accounts of the churchwardens and overseers of the poor, must specify in writing the particular grounds of appeal, and be signed by the person giving the same, or his attorney on his behalf (a).

§ 800. So, also, under the Poor-law Amendment Act, no pauper can be removed from one parish to another, unless by written consent, until twenty-one days after notice of chargeability *in*

(r) 7 & 8 Vict. c. 112, § 2.

(s) § 4.

(t) § 5.

(u) 6 & 7 Vict. c. 86, § 23. Such agreement is not liable to stamp duty, *id.*

(x) 6 & 7 Vict. c. 18, § 7, and Schedule A. No. 4 & 5, as to counties; § 17, Sched. B. No. 10 & 11, as to cities and boroughs; *Toms v. Cuming*, 7 M. & Gr. 88; *Pruen v. Cox*, 2 Com. B. 1.

(y) 6 & 7 Vict. c. 18, § 100; *Toms v. Cuming*, 7 M. & Gr. 88.

(z) 6 & 7 Vict. c. 18, § 62; *Petherbridge v. Ash*, 4 Com. B. 74. See *Rawlins v. West Derby*, 2 Com. B. 72.

(a) 41 Geo. 3, c. 23, § 4, U. K.

writing, accompanied by a copy or counterpart of the order of removal, and by a copy of the examinations, shall have been sent by post or otherwise, by *the overseers or guardians of the parish* obtaining such order, or any *three or more of such guardians*, to the overseers of the parish to whom such order shall be directed (a); and no appeal can be heard against such order, unless the *overseers or guardians* of the appellant parish, or any three or more of such *guardians*, shall, with a notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, have sent or delivered to the overseers of the respondent parish *a statement in writing under their hands* of the grounds of appeal (b). In construing these provisions, the Court of Queen's Bench have held that notices of chargeability and of grounds of appeal will respectively be valid, if signed by a majority of the aggregate body of the overseers and churchwardens (c); but that they must be signed by at least such a majority (d). It has not yet been determined, whether or not it be necessary that the document should show on its face that it proceeds from a majority of the parish officers, but it is certainly very desirable that this fact should appear (e). The guardians mentioned in these clauses are not guardians of a union, but are guardians expressly appointed to act for particular parishes under § 39 of the statute (f). As a parish is generally bound by the acts of those persons whom it represents to be its officers, the adverse parish, on a principle of reciprocity, is precluded from disproving the legality of the appointments of such officers, unless the notice signed by them be invalid on its face (g).

§ 801. In considering how and when the signatures rendered necessary by these several Acts, may be affixed *by procuration*, attention must be paid to the language employed by the Legislature in each particular case. In some cases, as for instance in those

(a) 4 & 5 Will. 4, c. 76, § 79.

(b) 4 & 5 Will. 4, c. 76, § 81.

(c) *R. v. Warwickshire*, 6 A. & E. 873; 2 N. & P. 153, S.C.; *R. v. Derbyshire*, 6 A. & E. 885.

(d) *R. v. Westbury*, 5 Q. B. 500.

(e) *R. v. Westbury*, 5 Q. B. 504, 505.

(f) *R. v. Surrey*, 5 Q. B. 506; *R. v. Lambeth*, and *R. v. Southampton*, id. 513.

(g) *R. v. Leominster*, 5 Q. B. 640, 652.

which fall within the 7th section of the Statute of Frauds (*h*), the 2nd section of the Act relating to Merchant Seamen (*i*), the 7th, 17th, and 62nd sections of the Voters' Registration Act (*k*), the 23rd section of the Act for Regulating Metropolitan Public Carriages (*l*), the 1st, 5th, and 6th sections of Lord Tenterden's Act (*m*), and the 14th and 28th sections of the Real Property Limitation Act (*n*), it seems to be clear that the *signature of an agent*, however appointed, *will not suffice*. Whether notices of chargeability, or grounds of appeal against orders of removal, may be signed by agents or attorneys on behalf of parish officers, is a question not yet determined, though the better opinion appears to be that these documents must be personally signed (*o*). In other cases, though the paper may be signed by an agent, yet his *authority* to do so must be *evidenced in writing*. For instance, this is expressly required in the 1st and 3rd sections of the Statute of Frauds (*p*), and in § 131 of 6 Geo. 4, c. 16 (*q*). In other cases again, the Legislature, while it allows agents to sign the documents, *does not require them to act under any written authority*. Thus, in cases falling within the 4th or 17th sections of the Statute of Frauds (*r*), the 40th section of the Real Property Limitation Act (*s*), the 5th section of the Act for the Amendment of the Law (*t*), and the 4th section of the Act of 41 Geo. 3, c. 23, respecting notices of appeal against poor rates (*u*), an agent, authorised merely by parol, may sign the respective documents on behalf of his principal; and even though the agent has acted in the first instance without any authority whatever, yet, if the principal by subsequent conduct has recognised and adopted what he has done, this will be sufficient to satisfy the respective statutes (*x*).

§ 802. The practical effect of these rules, which rest on no

(*h*) Ante, § 736.

(*i*) Ante, § 798.

(*k*) Ante, § 799.

(*l*) Ante, § 798.

(*m*) Ante, §§ 783, 792, 793; *Hyde v. Johnson*, 2 Bing. N. C. 776; 3 Scott, 289, S.C.; *Gibson v. Baghott*, 5 C. & P. 211, per Parke, B. (*n*) Ante, § 795.

(*o*) *R. v. Worcester*, 5 Q. B. 508, n.; *R. v. Surrey*, 5 Q. B. 506.

(*p*) Ante, §§ 725, 727.

(*q*) Ante, § 798.

(*r*) Ante, § 738. (*s*) Ante, § 795.

(*t*) Ante, § 796.

(*u*) Ante, § 799.

(*x*) *Maclean v. Dunn*, 4 Bing. 722; 1 M. & P. 761, S.C.; *Gosbell v. Archer*, 2 A. & E. 500, 507.

principle, but are the result of arbitrary, if not of accidental, legislation, is in some instances sufficiently absurd. Thus, while no action can be brought against a man for falsely representing his friend to be a person of substance, unless such representation be in writing signed by himself, any person may be sued on an ordinary guarantee to be answerable for another's debt, if the promise to pay be given in writing by his authorised agent; that is, the latter person, unlike the former, is exposed to be charged by the verbal statement of the party actually signing the promise, that he had authority so to sign (*y*). So, also, while an agent cannot bind his principal by surrendering a lease not exceeding the term of three years, unless he be duly authorised in writing, he may, under a mere oral authority, enter into a contract for the sale of lands; or for the sale of merchandise above the value of ten pounds (*z*). We may here add that an *auctioneer* is regarded as the agent of both vendor and purchaser, whether the subject of the sale be lands or goods; and if the whole contract can be made out from the memoranda and entries signed by him, it is sufficient to bind them both (*a*).

§ 803. Besides the Acts noticed above, and many others of a like nature, which require certain transactions to be evidenced by writing, there are a cloud of statutes which, in order to give validity to documents, render it necessary that they should be executed or attested in a particular form. We do not here intend to undertake the difficult task of enumerating these statutes; but before leaving the subject we may observe that the assignment of bail bonds (*b*), and replevin bonds (*c*), the protest of bills of exchange (*d*), and the execution of both parts of the deed of bargain and sale inrolled, whereby the exchange of charity lands is now effected (*e*), must respectively be attested by two or more credible witnesses.

(*y*) *Lyde v. Barnard*, 1 M. & W. 104, per Gurney, B.

(*z*) *Ante*, §§ 727, 738; 1 Sug. V. & P. 186. See 7 M. & W. 343.

(*a*) *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 290; *Kenworthy v. Schofield*, 2 B. & C. 945; 4 D. & R. 556, S.C.; 1 Sug. V. & P. 188—191.

(*b*) 4 Ann. c. 16, § 20.

(*c*) 11 Geo. 2, c. 19, § 23. See *Thompson v. Farden*, 1 M. & Gr. 535; 8 Dowl. 813, S.C. (d) 9 & 10 Will. 3, c. 17, § 1. (e) 1 & 2 Geo. 4, c. 92, § 4.

§ 804. So, by the Act of 1 & 2 Vict. c. 110, “no *warrant of attorney* to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force, unless there shall be present some attorney of the superior courts on behalf of such person, *expressly named by him* and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and *thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney*”(f). And no warrant or cognovit executed in any other manner shall be “rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (g).” These provisions, which were passed into law by the Legislature, in order to secure to indigent and ignorant defendants due information of the nature and effect of the documents they are called upon to sign, and thus to protect them against the practices of hard designing plaintiffs, are so stringent in themselves, and have been so strictly interpreted by the Courts, that it behoves creditors, when seeking to obtain these securities, to take the greatest care that their debtors literally comply with the directions of the Act (h).

§ 805. First, the attesting witness must be a certificated attorney(i), though, if the defendant introduces a person as such, he will be estopped from afterwards denying his character, at least, unless he can clearly show that he acted in ignorance(k). Secondly, the attorney attending on behalf of the defendant must be some person *other than* the attorney, or the attorney’s agent, acting for the plaintiff(l); and though the statute does not require that the

(f) § 9. See also, Reg. Gen. H. T. 2 Will. 4, § 72; 3 B. & Ad. 384, as to cases where the party is in custody.

(g) § 10.

(h) See Mr. Robinson’s useful little book on the Law of Warrants of Attorney, 34—57.

(i) Paul v. Cleaver, 2 Taunt. 360; Price v. Carter, 7 Q. B. 843.

(k) Cox v. Cannon, 4 Bing. N. C. 453; 6 Dowl. 625, S.C.; Joyes v. Booth, 1 B. & P. 97; Wallace v. Brockley, 5 Dowl. 695; Price v. Carter, 7 Q. B. 838, per Patteson, J.

(l) Mason v. Kiddle, 5 M. & W. 513; S.C. nom. Mason v. Riddle, 8 Dowl. 207; Rising v. Dolphin, 8 Dowl. 309; Pryor v. Swaine, 2 Dowl. & L. 37, per Coleridge, J.

plaintiff should employ an attorney, yet as he seldom, in fact, proceeds in these matters without the assistance of one, it ought to be perfectly clear, in the event of a single attorney being present, that he was acting *exclusively* on behalf of the defendant (*m*). Thirdly, it is not necessary that the attorney should be *originally* or *spontaneously* named by the defendant, or that he should *come* to the place of meeting at his request; but if he *remains* there at the defendant's request, and is clearly and *expressly* adopted by him as his attorney, this will suffice, though he may have been introduced by the plaintiff himself, or by his legal adviser (*n*). Still, as an introduction from such a quarter will always be regarded with distrust, and may often, when taken in conjunction with other suspicious circumstances, raise a strong inference of fraud, it is never advisable for a plaintiff or his attorney to interfere in this manner (*o*); and the imprudence of such a course will be more apparent, when it is considered, that in all cases of this kind it must distinctly appear, that the defendant was fully aware of his having an option in the choice of his attorney, and, moreover, that he had an opportunity of exercising such option, and did in fact exercise it (*p*). Fourthly, the attorney is not bound to read over the instrument to his client, unless he is desired to do so; but he attends for the purpose of explaining its nature and effect; and even this explanation may be waived, if the client does not require it (*q*). Lastly, the memorandum of attestation must be drawn with great care, and in it the subscribing witness must distinctly state two things; first, that he *is the attorney* of the party executing the instrument; and next, that *he subscribes as such*.

(*m*) *Sanderson v. Westley*, 6 M. & W. 98, 100, per Alderson, B.; 8 Dowl. 412, S.C.

(*n*) *Walton v. Chandler*, 1 Com. B. 306; 2 Dowl. & L. 802, S.C.; *Taylor v. Nicholls*, 6 M. & W. 91, 95; 8 Dowl. 242, S.C.; *Bligh v. Brewer*, 1 C. M. & R. 651; 5 Tyr. 222; 3 Dowl. 266, S.C.; *Oliver v. Woodroffe*, 4 M. & W. 650; 7 Dowl. 166, S.C.; *Pease v. Wells*, 8 Dowl. 626.

(*o*) *Taylor v. Nicholls*, 6 M. & W. 96, per Parke, B.

(*p*) *Gripper v. Bristow*, 6 M. & W. 807, 812; 8 Dowl. 797, S.C.; *Barnes v. Pendrey*, 7 Dowl. 747; *Walker v. Gardner*, 4 B. & Ad. 371.

(*q*) *Taylor v. Nicholls*, 6 M. & W. 95, per Parke, B.; 8 Dowl. 242, S.C.; *Oliver v. Woodroffe*, 4 M. & W. 651, per Parke, B.; 7 Dowl. 166, S.C.

§ 806. No precise form of words is rendered necessary by the Act, but those used must be such as to enable the Courts, either directly, or by necessary inference, to collect *both* the above facts (*r*). Where, therefore, the attestation was as follows;—“Witness, A. B., defendant’s attorney, named by him, and attending at his request”(*s*);—or, “Signed by the above named M., in the presence of us, of whom the said A. is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to the said M. before the execution thereof by him. A. attorney. B.”(*t*);—or, “Witnessed by me W., as the attorney of the said N., attending at the execution hereof at his request, and expressly named by him. W. of Prescott, Lancashire”(*u*);—the Courts held that the instruments were respectively invalid, as no one of the attestation clauses stated that the witness subscribed as the defendant’s attorney. So, where the attestation was in the following form;—“Signed by A. in my presence, and I subscribe myself as attorney for the said A., expressly named by him to attest his execution of these presents;”—it was held, though with some doubt, to be insufficient, as containing no distinct declaration by the attesting witness of his being the attorney for the defendant (*x*).

§ 807. Where, however, the attestation was as follows, “Signed, sealed, and delivered in the presence of E. F., attorney for the said C. D., and expressly named by him, and attending at his request. And I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney, before the same was executed by him; and I hereby subscribe my name as a witness to the due execution thereof, E. F.”(*y*); and in this form, “Duly executed by the above named R. G., in the presence of me, the undersigned S. B., attorney on

(*r*) Per Parke, B., in *Hibbert v. Barton*, 10 M. & W. 683, 684.

(*s*) *Poole v. Hobbs*, 8 Dowl. 113, per Coleridge, J.; recognised and acted upon in 5 Q. B. 184. See also *Potter v. Nicholson*, 8 M. & W. 294; 9 Dowl. 808, S.C.

(*t*) *Everard v. Poppleton*, 5 Q. B. 181.

(*u*) *Hibbert v. Barton*, 10 M. & W. 678; 2 Dowl. N. S. 434, S.C.

(*x*) *Elkington v. Holland*, 9 M. & W. 659; 1 Dowl. N. S. 643, S.C.

(*y*) *Lewis v. Lord Kensington*, 2 Com. B. 463.

behalf of the said R. G., expressly named by him, and attending at his request; and I do hereby declare that I subscribe my name as witness to the due execution hereof by the said R. G., and as his attorney, and that, previous to the execution hereof by the said R. G., I informed him of the nature and effect hereof. S. B., attorney, Birmingham”(z); it was held to be sufficient. So, where the witness, after declaring himself to be the defendant's attorney, added, “and I subscribe myself *accordingly*, A. B.,” the directions of the Act were deemed to have been followed (a); and so, where the question was, whether the words, “of me, M., the attorney of the said N.,” satisfied the statute, which required that the witness should “thereby declare himself to be attorney for the person, &c.,” it was held that they did, both in substance and in form (b).

§ 808. Notwithstanding the stringent and comprehensive language of the Act, it seems to be now settled, that where the person executing a warrant of attorney or cognovit is *himself an attorney*, he may dispense with the presence of another attorney on his behalf; for as attornies are expressly selected to impart information to others respecting the nature of these instruments, they are presumed to require no advice on such a subject; and not being within the mischief of the statute, its provisions do not apply to them (c). But the Act extends to warrants of attorney executed abroad, if sought to be enforced in this country; for the evil, which is intended to be remedied, affects such instruments, equally with those which are executed at home (d). The Legislature, apparently by an oversight, has drawn a distinction between warrants of attorney and cognovits; the Act applying equally to all the latter class of instruments, but being confined to such of the former class as relate to personal actions. The result is, that, if a defendant in ejectment gives a warrant of attorney to confess judgment,

(z) *Phillips v. Gibbs*, 4 Dowl. & L. 275. *16 M. & W. 208, P. C.*

(a) *Lindley v. Girdler*, 1 Dowl. & L. 699, per Patteson, J.

(b) *Knight v. Hasty*, 12 Law J. N. S. Q. B. (Bail C.), 293; recognised in 5 Q. B. 183. See further, *Ledgard v. Thompson*, 11 M. & W. 40; 2 Dowl. N. S. 766, S. C.

(c) *Chipp v. Harris*, 5 M. & W. 430; *Downes v. Garbutt*, 2 Dowl. N. S. 939, per Coleridge, J.

(d) *Davis v. Trevanion*, 2 Dowl. & L. 743, per Wightman, J.

no statutory execution is required (e); but if he gives a cognovit for the same purpose, it will be set aside unless duly attested in conformity with the Act (f). We may add, that as the above provisions were made exclusively for the benefit of defendants, third parties, even though prejudiced by warrants of attorney or cognovits having been given by such defendants to other creditors, cannot object to these instruments on the ground that no attorney attested their execution (g). So, where judgment had been entered up on a warrant of attorney, executed by principal and sureties, and one of the sureties had paid the debt and recovered contribution from his co-surety, it was held that such co-surety could not set aside the warrant, and compel the plaintiff to repay him the amount of contribution, on the ground of defective attestation (h).

§ 809. The above decisions, which relate to the execution of warrants of attorney, and cognovits, would seem to be equally applicable to *satisfaction-pieces*, which may now be used in any of the common law courts, in lieu of a warrant of attorney to acknowledge satisfaction of a judgment, or a judge's fiat thereon; provided they be signed by the plaintiff or plaintiffs, or their personal representatives, and the signature or signatures be witnessed in like manner as in the case of warrants of attorney under 1 & 2 Vict., c. 110 (i).

(e) *Doe v. Kingston*, 1 Dowl. N. S. 263, per Patteson, J.

(f) *Doe v. Howell*, 12 A. & E. 696.

(g) *Chipp v. Harris*, 5 M. & W. 430. See *Pinches v. Harvey*, 1 Q. B. 869.

(h) *Price v. Carter*, 7 Q. B. 838.

(i) Reg.-Gen. E. T. 7 Vict.; 7 M. & Gr. 323.

CHAPTER XVIII.

ON THE ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN INSTRUMENTS.

§ 810. WE now come to perhaps the most difficult branch of the law of evidence; namely, that which regulates the *admissibility of extrinsic parol testimony to affect written instruments*; but before we proceed to discuss the rules of law directly connected with this subject, it will be well to advert to one or two established principles, which govern the interpretation of all writings. And first, in order to put a just construction upon the language of any document, it is necessary that the Court should *read the whole* of it together, and should determine the meaning of the words employed in the passage under discussion, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument (*a*). For it is obvious, that the language of a particular passage may be capable of bearing a wider or narrower signification, when read in connection with other parts of the instrument where the same language is employed, than it would have borne, had no such reflected light been thrown upon it. For instance, suppose a question to arise respecting the meaning of the word "close" as used in a will. If this expression were only to occur once, evidence would be admissible to show, that, in the county where the property was situate, it denoted a farm; but if the word were found in other parts of the will, in any one of which this enlarged meaning could not be applied to it, such evidence would be clearly rejected, as the Court would then see that the testator had used the word in its ordinary sense, as denoting an inclosure (*b*). So, if the point at issue was whether a legacy, given by a codicil to a legatee under the will, was to

(*a*) *Blundell v. Gladstone*, 11 Sim. 486; 1 Phill. 279, 283, 289, S.C.; *Bateman v. Lord Roden*, 1 Jones & Lat. 356, 368—370, per Sugden, C.

(*b*) *Richardson v. Watson*, 4 B. & Ad. 787, 799, per Parke, J.; 1 N. & M. 575, S.C.

be regarded as cumulative or substitutionary, the Court would certainly be justified in looking, not only to other parts of the same codicil, but to bequests in other later testamentary instruments; and if it should appear that, in these later codicils, the testator had used the words "in addition," when making bequests to other parties which were intended to be cumulative, the absence of these words, or of expressions of equivalent import, in regard to the legacy in question, would be a circumstance, though far short of conclusive, yet tending to show, in connection with other facts and arguments, that the latter legacy was intended not to be additional, but in substitution. The Court, in such a case, would be bound to carry back and apply to the first codicil the knowledge it had acquired by examining the language of the later bequests (c).

§ 811. If the instrument consists partly of a printed formula, and partly of written words, and there is any reasonable doubt of the meaning of the whole, the *written words* are entitled to have *greater effect* in the interpretation, than those which are printed; they being the immediate language and terms selected by the parties themselves for the expression of their meaning, while the *printed formula* is more general in its nature, applying equally to their case, and to that of all other contracting parties on similar subjects and occasions (d).

§ 812. Next, the terms of every document must, in the absence of all parol testimony, be construed in their *primary* sense, unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, they must be understood in some other and peculiar sense (e). But it may be said, what is the primary sense of a word? and this is a question which, in some cases, may be more easily asked than answered (f). It may, however, be stated generally, that if the

(c) *Lee v. Pain*, 4 Hare, 218—221, 236, per Wigram, V. C.; *Russell v. Dickson*, 2 Dru. & War. 139, per Sugden, C.

(d) Per Lord Ellenborough, in *Robertson v. French*, 4 East, 136.

(e) *Robertson v. French*, 4 East, 135, 136, per Lord Ellenborough; *Mallan v. May*, 13 M. & W. 517, per Pollock, C. B.; *Boorman v. Johnston*, 12 Wend. 573.

(f) See *Doe v. Perratt*, 6 M. & Gr. 314, where the judges, in delivering their opinions before the House of Lords, differed widely upon the question, as to

language be technical or scientific, and be used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning (*g*); but if, on the other hand, the expressions have reference to the common transactions of life, they will be interpreted according to their plain, ordinary, and popular meaning (*h*).

whether the word "heir," in a will, was to be construed in its technical or popular sense.

(*g*) *Shore v. Wilson*, 9 Cl. & Fin. 525, per Coleridge, J.; *Doe v. Perratt*, 6 M. & Gr. 342, per Parke, B.

(*h*) *Robertson v. French*, 4 East, 135, per Lord Ellenborough; *Shore v. Wilson*, 9 Cl. & Fin. 565, per Tindal, C. J. The rules for the interpretation of wills, laid down by Vice-Chancellor Wigram in his able treatise on that subject, may be safely applied, mutato nomine, to all other private instruments. They are contained in seven propositions, as the result both of principle and authority, and are thus expressed :—"I. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptance, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. IV. Where the characters in which a will is written are difficult to be decyphered, or the language of the will is not understood by the Court, the evidence of persons skilled in decyphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the Court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person, who claims to be interested under the will, and to the property, which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be shown, that a knowledge of extrinsic facts can in any way be made

§ 813. Bearing these two principles in mind, the first general rule which it will be necessary to notice, respecting the admissibility of extrinsic evidence to affect what is in writing, is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument* (i). This rule of the common law, which may be traced back to a remote antiquity, is founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls, "the uncertain testimony of slipperiness memory" (k). When parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume, that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong (l).

ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of law, in certain special cases, admit extrinsic evidence of *intention*, to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (i.e. *person* or *thing* intended) is described in terms, which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigram on Wills, pp. 11—14.

(i) *Goss v. Lord Nugent*, 5 B. & Ad. 64, 65; Wigram on Wills, 5; 2 Ph. Ev. 350. So by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses." Tait Ev. 326, 327.

(k) *Lady Rutland's case*, 5 Rep. 26 (a) 1st Res.

(l) *Preston v. Merceau*, 2 W. Bl. 1249; *Rich v. Jackson*, 4 Bro. Ch. R. 519, per

§ 814. Independent, too, of all considerations of convenience, the legislature has, by positive enactment, adopted the same rule in several cases as an arbitrary and absolute one; and by requiring certain dispositions of property, and other transactions, to be evidenced by writing,—as, for instance, wills, contracts within the Statute of Frauds, and the like (*m*),—has rigidly excluded all parol testimony tending to vary the terms contained in the written instrument (*n*). But though the statutory rule will perhaps be more strictly enforced, than that which rests on the common law alone, because, in the former case, to relax the rule in any degree, is to the like extent to repeal the particular Act which renders the writing necessary (*o*);—yet, at the present day, it seems to be generally admitted as indisputable law, that the term, “written instrument,” as used in the rule, includes, not only records, deeds, wills, and other instruments required by the statute or common law to be in writing, but every document, which contains the terms of a *contract* between different parties, and is designed to be the repository and evidence of their final intentions (*p*).

§ 815. To other *less formal documents the rule does not extend*; and, therefore, a *receipt* is not conclusive evidence of the payment therein acknowledged to have been made, but the party signing it may invalidate its effect by oral evidence, not only of fraud, but of mistake or surprise on his part; and in short, the document, like any verbal statement made by a person, and afterwards given in evidence to affect him, amounts only to *prima facie* proof, and is capable of being explained (*q*). So, a loose memorandum, which does not seem to have been intended by the parties to contain the

Lord Thurlow; *Adams v. Wordley*, 1 M. & W. 374; *Parteriche v. Powlet*, 2 Atk. 383, per Lord Hardwicke; *Bogert v. Cauman*, Anthon's R. 70; *Bayard v. Malcolin*, 1 Johns. 467, per Kent, C. J.

(*m*) See, ante, §719, et seq. (*n*) Wigram on Wills, 4, 7, 8, 117, 118.

(*o*) *Id*; *Miller v. Travers*, 8 Bing. 250, 251; *Doe v. Hiscocks*, 5 M. & W. 369; *Clayton v. Lord Nugent*, 13 M. & W. 205, per Alderson, B., 208, per Rolfe, B.

(*p*) *Woolam v. Hearn*, 7 Ves. 218, per Sir W. Grant; *Shore v. Wilson*, 9 Cl. & Fin. 540, per Williams, J.; *Stackpole v. Arnold*, 11 Mass. 31, per Parker, J.; *Hunt v. Adams*, 7 Mass. 522, per Sewell, J.

(*q*) *Farrar v. Hutchinson*, 9 A. & E. 641, 643; 1 P. & D. 437, S.C.; *Skaife v. Jackson*, 3 B. & C. 421; *Wallace v. Kelsall*, 7 M. & W. 273, 274; *Fuller v. Crittenden*, 9 Conn. 406.

terms of their contract, will not exclude parol evidence on that subject. For instance, where a plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and shortly after the purchase was completed, the defendant gave him a paper in the following form :—"Bought of A. B., a horse for 7*l.*—A. B.,"—the Court, in an action for breach of warranty, held that the plaintiff might prove the warranty by parol evidence, as the paper appeared to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, and not as containing the terms of the contract itself (*r*). So, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "six weeks at two guineas, W. H.," the owner was allowed to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, but an additional term of the contract, namely, that all accidents occasioned by the *shying* of the horse should be at the risk of the hirer (*s*). Again, in the sale of a chattel under the value of 10*l.*, an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if when the article was put up to auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement (*t*).

§ 816. Having thus pointed out the class of written instruments to which the rule applies, we may next observe that the rule is not infringed by the admission of parol evidence, under the proper plea (*u*), showing that the instrument is altogether *void*, or that it *never* had any *legal* existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject-matter, or for want of due execution and delivery (*x*). *Fraud* practised by the

(*r*) *Allen v. Pink*, 4 M. & W. 140, 143, 144; 6 Dowl. 868, S.C.

(*s*) *Jeffery v. Walton*, 1 Stark. R. 267. For other instances, see *ante*, § 298.

(*t*) *Eden v. Blake*, 13 M. & W. 614. As to examinations of prisoners, see, *ante*, §§ 646—648.

(*u*) *Ante*, § 205.

(*x*) *Collins v. Blantern*, 2 Wils. 341; 1 Smith Lead. Ca. 154—170, S.C., and cases there cited in the notes; *Paxton v. Popham*, 9 East, 421, 422, per Lord Ellenborough.

party seeking the remedy upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to his title. "The covin," says Lord Coke, "doth suffocate the right." It matters not in this respect whether the foundation of the claim be a record, a deed, or a writing without seal; for in either case the instrument will be void if obtained by fraud, and the fraud may be established by parol evidence (*y*). Thus, if a person has been induced by verbal fraudulent statements to enter into a written contract for the purchase of a house, a ship, or the like, it is competent for him, in an action on the case for a deceitful representation, to prove the fraud by evidence aliunde, though the written contract or the deed of conveyance is silent on the subject, to which the fraudulent representations refer (*z*). So, the declarations of a testator are admissible to show his intentions, if the will be impeached on the ground of fraud, circumvention, or forgery (*a*); and the representation of a vendor respecting some particular quality of the article sold, may be given in evidence, if the purchaser has thereby been fraudulently prevented from discovering a fault which the vendor knew to exist (*b*).

§ 817. Parol evidence may also, under the proper plea (*c*), be offered to show that the contract was made for the furtherance of objects *forbidden*, either by statute, or by common law (*d*); or that the writing was obtained by *duress* (*e*); or that the party was incapable of binding himself by reason of some legal impediment, such as infancy, coverture (*f*), idiocy, insanity,

(*y*) Tait Ev. 327, 328; Buckler v. Millerd, 2 Ventr. 107; Filmer v. Gott, 4 Bro. P. C. 230; Taylor v. Weld, 5 Mass. 116, per Sedgwick, J.; Franchot v. Leach, 5 Cowen, 508; Dorr v. Munsell, 13 Johns. 431; Morton v. Chandler, 8 Greenl. 9; Com. v. Bullard, 9 Mass. 270.

(*z*) Dobell v. Stephens, 3 B. & C. 623; 5 D. & R. 490, S. C.; Wright v. Crookes, 1 Scott, N. R. 685, 698.

(*a*) Doe v. Hardy, 1 M. & Rob. 525; Doe v. Allen, 8 T. R. 147.

(*b*) Kain v. Old, 2 B. & C. 634, per Abbott, C. J.

(*c*) Ante, § 205.

(*d*) Collins v. Blantern, 2 Wils. 347; 1 Smith Lead. Ca. 154, 168, n. See also Biggs v. Lawrence, 3 T. R. 454; Waymell v. Read, 5 T. R. 600; Doe v. Ford, 3 A. & E. 649; Sinclair v. Stevenson, 1 C. & P. 582; Norman v. Cole, 3 Esp. 253.

(*e*) 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig. Plead. 2, W. 18—23.

(*f*) Id.

or intoxication (*g*); or that the instrument came into the hands of the plaintiff without any absolute and final *delivery* by the obligor or party charged (*h*).

§ 818. The *want or failure of consideration* may also be proved by parol evidence, showing that the written agreement is not binding (*i*); unless it be under seal, which, in the absence of fraud, is conclusive evidence of a sufficient consideration (*k*). But further, if *no* consideration is stated in a deed, the party will be allowed to prove one by extrinsic evidence (*l*); and if the deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain (*m*). If, indeed, an instrument *under seal* specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, no extrinsic proof of another can in general be given, because such proof would contradict the deed (*n*). Still, if the object be to establish or negative the existence of fraud, such proof will be admissible. Thus, where a conveyance purported to have been made in consideration of 10,000*l.*, and natural love and affection, the Court, in a suit to set it aside, admitted extrinsic evidence to show that the estates were worth 30,000*l.*, and that natural love and affection constituted no part of the real consideration (*o*). So, where a father assigned his house and personalty to his son by deed, "in consideration of natural love and affection," and afterwards the sheriff seized part of the personalty under a *fi-fa.* against the father, the son, in proceeding against the sheriff, was permitted to give evidence of a valuable consideration, and thus to rebut the presumption of fraud against

(*g*) B. N. P. 172; *Barrett v. Buxton*, 2 Aik. 167, per Prentiss, J.

(*h*) B. N. P. 172; *Clark v. Gifford*, 10 Wend. 310; U. S. v. *Leffler*, 11 Peters, 86.

(*i*) *Foster v. Jolly*, 1 C. M. & R. 707, 708; *Solly v. Hinde*, 2 Cr. & Mee. 516; *Abbott v. Hendricks*, 1 M. & Gr. 791, 794—796; ante, § 740.

(*k*) Ante, § 68.

(*l*) *Peacock v. Monk*, 1 Ves. Sen. 128.

(*m*) 2 Ph. Ev. 353; *Tull v. Parlett*, M. & M. 472, per Tindal, C. J.

(*n*) *Peacock v. Monk*, 1 Ves. Sen. 128, per Lord Hardwicke; cited by Alderson, B. in *Gale v. Williamson*, 8 M. & W. 408.

(*o*) *Filmer v. Gott*, 7 Bro. P. C. 70; cited by Lord Kenyon in *R. v. Scammonden*, 3 T. R. 475, 476.

creditors, which a deed, made by a debtor in consideration of natural love and affection, *prima facie* imports (*p*).

§ 819. Courts of Equity will also sometimes admit parol evidence to contradict or vary a writing, where, by some *mistake in fact* (*q*), it speaks a different language from what the parties intended; and where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms. In all cases, however, of this kind, the party seeking relief undertakes a task of great difficulty, since a Court of Equity will not interfere, unless it be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected (*r*). A *plaintiff* may seek the relief in equity by filing a bill, either to *reform* the writing,—in which event it will be necessary to satisfy the Court that there was a mistake on *both* sides (*s*); or to *rescind* the instrument,—in which case, though conclusive proof of error or surprise on the plaintiff's part alone will suffice (*t*), it must appear that the mistake was one of vital importance (*u*). In either of these cases, if the defendant by his answer denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the Court in granting the relief prayed (*x*). A *defendant*, also, against whom a specific performance of a written agreement is sought, may insist by way of answer upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be

(*p*) *Gale v. Williamson*, 8 M. & W. 405, 409—411; *Pott v. Todhunter*, 2 Coll. C. R. 76, 84. See 13 Eliz. c. 5.

(*q*) See *Hunt v. Rousmanier*, 8 Wheaton, 211 et seq.

(*r*) *M. of Townsend v. Strangroom*, 6 Ves. 339; *Mortimer v. Shortall*, 2 Dru. & War. 371, per Sugden, C.; *Gillespie v. Moon*, 2 John. Ch. R. 585.

(*s*) *Mortimer v. Shortall*, 2 Dru. & War. 372, per Sugden, C.

(*t*) *Id.*

(*u*) 1 Story Eq. Jur. § 144, n.

(*x*) *Mortimer v. Shortall*, 2 Dru. & War. 374, per Sugden, C.; *Alexander v. Crosbie, Lloyd and Gould*, R. temp. Sugden, 150; *M. of Townsend v. Strangroom*, 6 Ves. 339; *Gillespie v. Moon*, 2 John. Ch. R. 600, per Kent, C.

inequitable to enforce the contract (y). But here we must notice an artificial distinction, which appears to be now recognised as undoubted law in British courts of equity, and which is this: that though parol evidence may be received *against* a plaintiff seeking a specific performance, it will be inadmissible in his *favour*; or, in other words, Courts of Equity will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution (z). We may, however, add that, in America, Mr. Chancellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject this distinction as unfounded in justice (a); and Mr. Justice Story has taken the same view of the matter, observing, with much force, that there is no mutuality or equality in the operation of such a doctrine (b).

§ 820. It may next be observed, that the rule under discussion does not exclude verbal evidence, when adduced to prove that the written agreement has been *totally waived or discharged*. If, indeed, the agreement be by *deed*, it can only be entirely, or even partially, dissolved, by an instrument of an equally solemn character; for the maxim of law is well established, that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur* (c). Therefore, where, to an action of covenant for non-payment of money, the defendant pleaded a parol discharge in satisfaction of all demands, the Court held, upon demurrer, that the covenant could not be discharged without a deed (d). A similar decision was pronounced on a rule

(y) 1 Story Eq. Jur., § 161; *M. of Townsend v. Strangroom*, 6 Ves. 328; *Davies v. Fitton*, 2 Dru. & War. 232, per Sugden, C.

(z) *Davies v. Fitton*, 2 Dru. & War. 232, per Sugden, C.; *Marq. of Townsend v. Strangroom*, 6 Ves. 328; *Woolam v. Hearne*, 7 Ves. 211; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & Bea. 375; *Rich v. Jackson*, 4 Bro. C. C. 514; 6 Ves. 334, n. S. C.; *Clinan v. Cooke*, 1 Sch. & Lef. 38, 39; *Att.-Gen. v. Sitwell*, 1 You. & Col. Ex. R. 559, 583.

(a) *Keisselbrack v. Livingston*, 4 Johns. Ch. R. 144, 148, 149.

(b) 1 Story Eq. Jur. § 161, and note. Those who require further information on this subject are referred to 1 Sugden, V. & P. 222—233, and 258—266; 1 Story Eq. Jur. §§ 152—161; *Gresley Ev.* 205—209.

(c) 2 Inst. 360; *Wingate's Maxims*, 68—72; *Story on Agen.* § 49; *Fowell v. Forrest*, 2 Saund. R. 47 ff, 47 gg; *Harris v. Goodwyn*, 2 M. & Gr. 405; 2 Scott, N. R. 459, S. C.; *Doe v. Gladwin*, 6 Q. B. 953, 962; *Rawlinson v. Clarke*, 14 M. & W. 187, 192.

(d) *Rogers v. Payne*, 2 Wils. 376, recognised in *West v. Blakeway*, 2 M. & Gr. 751; *Cordwent v. Hunt*, 8 Taunt. 596.

obtained by the plaintiff for judgment non obstante veredicto, in a case where an action had been brought by a landlord against his tenant, on a covenant by the latter to yield up, at the expiration of the term, all erections set up during the tenancy; the defendant having obtained a verdict on a plea stating an agreement between the parties, that, if the defendant built a greenhouse on the premises, he should be at liberty to remove it (*e*). So, it matters not, at common law, whether the agreement in discharge of the deed be in writing or merely verbal, or whether it be executory or executed; and, therefore, if an act is required by deed to be done within a certain time, evidence cannot be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended (*f*). It may be, however, that in this latter event, Courts of Equity will grant relief (*g*).

§ 821. As the doctrine just stated has nothing to do with the general rule under discussion, but rests entirely on the solemn nature of deeds, there seems no reason to doubt that any obligation by writing not under seal, may, in the *absence of statutory interference*, be either *totally or partially dissolved, before breach, by a subsequent oral agreement*; or, to adopt the language of Lord Denman in *Goss v. Lord Nugent* (*h*), "After an agreement [at common law] has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement."

(*e*) *West v. Blakeway*, 2 M. & Gr. 729; 3 Scott, N. R. 199, S. C.

(*f*) *Gwynne v. Davy*, 1 M. & Gr. 857, 871, per Tindal, C. J.; *Littler v. Holland*, 3 T. R. 590.

(*g*) *Gwynne v. Davy*, 1 M. & Gr. 868, per Tindal, C. J.

(*h*) 5 B. & Ad. 65. By the law of Scotland, no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him. Tait. Ev. 325.

§ 822. With respect to those cases where a writing is by statute made necessary to the validity of an agreement, the rule is different; for, although the better opinion seems to be, that contracts concerning the sale of lands or goods, which fall within the 4th or 17th section of the Statute of Frauds, may be *wholly waived or abandoned* by a *subsequent oral agreement*, so as to prevent either party from recovering on the original written contract, this doctrine rests on the peculiar language of the Act of Charles the Second, which, without distinctly stating that the contracts in question must be in writing, merely enacts that, unless they are so, no action shall be brought upon them (i). No general rule, therefore, can with safety be laid down respecting the validity of the oral dissolution of a statutory instrument; but in each case the special language of the Act requiring the writing must be duly considered; and in several cases, as, for instance, in that of a will, it is clear law that a verbal abandonment will not suffice (k). But whatever may be the effect of an oral dissolution of the entire statutory contract, thus much is certain, that *no verbal agreement to abandon it in part, or to add to, or modify, its terms, can be received*; for, to allow such contracts to be proved partly by writing, and partly by oral testimony, would be to let in all the mischiefs which it was the object of the Legislature to exclude; and here it matters not what term of the written contract is sought to be varied by parol, since no distinction can be drawn between the material and immaterial parts of the contract; but everything which originally formed part of the agreement, in regard to which the parties are stipulating, must be deemed to be material (l).

§ 823. If, then, a written contract is made for the sale, either of goods above the value of 10*l.*, or of lands, and the writing states a time for the delivery of the goods, or for the completion of the purchase, no verbal agreement to substitute another day for the one originally

(i) *Goss v. Lord Nugent*, 2 B. & Ad. 58, 65, 66, per Lord Denman; 2 N. & M. 28, S. C.; *Price v. Dyer*, 17 Ves. 356, per Sir W. Grant. These dicta go far towards overruling a contrary opinion expressed by Lord Hardwicke in *Buckhouse v. Crossby*, 2 Eq. Cas. Ab. 32, pl. 44, and in *Bell v. Howard*, 9 Mod. 306.

(k) *Ante*, § 777.

(l) *Marshall v. Lynn*, 6 M. & W. 116, 117, per Parke, B.

agreed upon will be valid (*m*). So, where a vendor had contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, the Court held, that, in an action for the purchase money, he was not at liberty to show a verbal waiver by the purchaser of his right to a good title as to one lot; since the effect of such a waiver was to substitute a partly oral contract for the one, which the Statute of Frauds required to be in writing (*n*). So, where a master had agreed by letter to pay his clerk a *yearly* salary, and the contract was necessarily in writing, being one which would not be performed within a year from its date, parol evidence was held to be inadmissible, when tendered to show either a contemporaneous or subsequent verbal agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made (*o*). Again, where there is an entire written agreement, consisting of divers particulars, some of which are within, and others without, the operation of the Statute of Frauds, a verbal agreement to vary the latter part in even some trifling particular, as, for instance, to have one valuer instead of two, cannot be received in evidence, though that part of the contract might, of itself, have been good without writing (*p*).

§ 824. In applying this doctrine to *testamentary instruments*, care must be taken to mark the distinction between the revocation of a will and the ademption, or, rather, the payment by anticipation, of a legacy; for although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy. Thus, where a testator bequeathed 3000*l.* to his daughter for her separate use for life, with remainder to her children, and gave the residue of his property to his son, it was held by Vice-Chancellor Wigram, in a suit by the children of the daughter against the son, claiming to have the legacy invested and secured for their benefit, that the

(*m*) *Stowell v. Robinson*, 3 Bing. N. C. 928; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 A. & E. 57; 2 P. & D. 447, S. C. These cases overrule *Cuff v. Penn*, 1 M. & Sel. 21; *Warren v. Stagg*, cited in *Littler v. Holland*, 3 T. R. 591; and *Thresh v. Rake*, 1 Esp. 53.

(*n*) *Goss v. Lord Nugent*, 5 B. & Ad. 58; 2 N. & M. 28, S. C.

(*o*) *Giraud v. Richmond*, 2 Com. B. 835.

(*p*) *Harvey v. Grabham*, 5 A. & E. 61, 74; 6 N. & M. 164, S. C.

defendant might show by extrinsic parol evidence, that, after the date of the will, the testator, at his daughter's request, had paid her husband 500*l.*, and had then declared that this sum was to be considered in part satisfaction of the legacy; and that he had expressed his determination not to alter his will, having been advised by his solicitor that it was unnecessary to do so (*q*). It will be seen that the evidence here admitted did not in any way revoke or alter the will, but simply proved a transaction, whereby the daughter had in part received her legacy by anticipation; and the declarations of the testator, being contemporaneous with the advance of the money, were rightly considered as part of that transaction.

§ 825. It is almost superfluous to observe, that the rule is not infringed by proof of any *collateral* parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject matter. For instance, where parties to an indenture of charter-party afterwards agreed by parol to use the ship for a period which was to elapse before the charter-party attached, it was held that this latter contract might be enforced by action of *assumpsit* (*r*). It would even seem, that, if money be received by a party, under circumstances raising an implied promise to pay it over to another, or under an express promise so to pay it over, and subsequently a deed be entered into between these parties in order to ascertain the amount to be paid over, an action of simple contract can be sustained (*s*).

§ 826. Next, the rule does not restrict the Court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, all *contemporaneous writings*, relating to the same subject-matter, are admissible in evidence, provided only that they be of equal solemnity with the principal document, and that no oral testimony be required for the purpose of connecting them therewith (*t*).

(*q*) *Kirk v. Eddowes*, 3 Hare, 509.

(*r*) *White v. Parkin*, 12 East, 578. See *Seago v. Deane*, 4 Bing. 459; *Fletcher v. Gillespie*, 3 Bing. 635; *Foster v. Allanson*, 2 T. R. 479.

(*s*) *Edwards v. Bates*, 7 M. & Gr. 600, 601, per Cresswell, J.

(*t*) *Leeds v. Lancashire*, 2 Camp. 205; *Hartley v. Wilkinson*, 4 Camp. 127;

§ 827. It may further be remarked, that the rule is *applied only in suits between the parties* to the instrument, and their representatives; as they alone are to blame if the writing contains what was not intended, or omits what it should have contained. It cannot affect third persons; who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others (*u*). Thus, in a settlement case, where the value of an estate upon which the validity of the settlement rested was in question, evidence of a greater sum paid than was recited in the deed was held admissible (*x*). So, in a similar case, parol evidence has been received to show that lands, described in a deed of conveyance as in one parish, were in fact situated in another (*y*). So, to show that, at the time of entering into a contract of service in a particular employment, there was a further agreement to pay a sum of money as a premium for teaching the pauper the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained (*z*). In another pauper case, where an unstamped assignment of a parish apprentice stated that the new master, in consideration of *3l.* paid him by the old master, agreed to accept the apprentice, &c., parol evidence that the money was in fact paid, not by the old master, but by the parish-officer, was admitted for the purpose of showing that the instrument did not require a stamp (*a*).

§ 828. It would seem that some of the cases cited in the last

Stone v. Metcalf, 1 Stark. R. 53; *Bowerbank v. Monteiro*, 4 Taunt. 846, per Gibbs, J.; *Gale v. Williamson*, 8 M. & W. 405; *Brown v. Langley*, 4 M. & Gr. 466, 470; *Hunt v. Livermore*, 5 Pick. 395; *Davlin v. Hill*, 2 Fairf. 434; *Couch v. Meeker*, 2 Conn. 302; *Lee v. Dick*, 10 Pet. 482; *Bell v. Bruen*, 17 Pet. 161; ante, § 742.

(*u*) Ante, § 385; 1 Poth. Obl. by Evans, p. 4, c. 2, art. 3, n. 766; *R. v. Cheadle*, 3 B. & Ad. 838; *Krider v. Lafferty*, 1 Whart. 303, 314, per Kennedy, J.; *Reynolds v. Magness*, 2 Iredell R. 26.

(*x*) *R. v. Scammonden*, 3 T. R. 474; *R. v. Olney*, 1 M. & Sel. 387; *R. v. Cheadle*, 3 B. & Ad. 833.

(*y*) *R. v. Wickham*, 3 A. & E. 517.

(*z*) *R. v. Laindon*, 8 T. R. 379.

(*a*) *R. v. Llangunnor*, 2 B. & Ad. 616.

section were determined, not only on the ground that the contending parties were strangers to the deed, but on the principle that, though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument (*b*). Indeed, it appears that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the *recitals of formal matter*, which may well be presumed not to have been stated with careful precision (*c*). For instance, parol evidence has, on several occasions, been admitted to *contradict the recited date of a deed*, order, or other instrument; as, by proving that a charter-party, dated February the 6th, conditioned to sail on or before February the 12th, was not executed till after the latter day, and that therefore the condition was dispensed with (*d*); or by showing, in answer to an objection that a notice of appeal was given too late, that the order, though bearing date the 24th of June, was in fact not signed by the justices till three days afterwards (*e*).

§ 829. Having now, by a series of negative propositions, pointed out the several classes of cases to which the rule under consideration does not extend, it will be expedient to advert shortly to some of the leading cases in which the rule has been actually applied, and parol evidence has been rejected. We shall thus best see the reason and policy of the rule, as well as its nature and extent. Thus, where a policy of insurance was effected on goods "in ship or ships from Surinam to London," parol evidence was held inadmissible to show, that a particular ship which was lost, had been verbally excepted at the time of the contract (*f*). So, where a policy described the two termini of the voyage, the insurers were not allowed to prove by parol evidence that the risk was not to commence

(*b*) *R. v. Stoke upon Trent*, 5 Q. B. 308, per Williams, J.

(*c*) 3 St. Ev. 787, 788; 2 Poth. on Obl. by Evans, 181, 182.

(*d*) *Hall v. Cazenove*, 4 East, 477. See *Steele v. Mart*, 4 B. & C. 273; *Cooper v. Robinson*, 10 M. & W. 694.

(*e*) *R. v. Flintshire*, 3 Dowl. & L. 537, per Williams, J.

(*f*) *Weston v. Emes*, 1 Taunt. 115.

till the vessel reached an intermediate place (*g*). So, where the instrument purported to be an absolute engagement to pay on a specified day, parol evidence of a contemporaneous oral agreement, that the payment should be prolonged (*h*), or depend upon a contingency (*i*), or be made out of a particular fund, has been rejected (*k*); and where goods were sold under a written contract, which was silent as to the time when they were to be taken away and payment was to be made, parol evidence was held inadmissible to prove, either that the goods were to be removed by the purchaser immediately (*l*), or that they were sold on a credit of six months (*m*). Again, where a written agreement of partnership was unlimited as to the time of commencement, parol evidence, that it was at the same time verbally agreed that the partnership should not commence till a future day, was held inadmissible (*n*). So, in assumpsit for use and occupation, upon a written memorandum of lease at a certain rent, parol evidence has been rejected of a cotemporaneous verbal agreement to pay a further sum, being the ground-rent of the premises, to the ground-landlord (*o*). So, where a ship was particularly described in a written contract of sale, parol evidence of a further descriptive representation, made prior to the sale, was held inadmissible to charge the vendor, without proof of actual fraud; all previous conversation being merged in the written contract (*p*).

(*g*) *Kaines v. Knightly*, Skin. 54; *Leslie v. De la Torre*, cited 12 East, 583.

(*h*) *Hoare v. Graham*, 3 Camp. 57; *Hanson v. Stetson*, 5 Pick. 506; *Spring v. Lovett*, 11 Pick. 417.

(*i*) *Rawson v. Walker*, 1 Stark. R. 361; *Adams v. Wordley*, 1 M. & W. 374; *Foster v. Jolly*, 1 C. M. & R. 703; 5 Tyr. 239, S. C.; *Free v. Hawkins*, 8 Taunt. 92; *Woodbridge v. Spooner*, 3 B. & A. 233; *Moseley v. Hanford*, 10 B. & C. 729; 5 M. & R. 607, S. C.; *Erwin v. Saunders*, 1 Cowen, 249; *Hunt v. Adams*, 7 Mass. 518.

(*l*) *Campbell v. Hodgson*, Gow, N. P. R. 74.

(*l*) *Greaves v. Ashlin*, 3 Camp. 426, per Lord Ellenborough.

(*m*) *Ford v. Yates*, 2 M. & Gr. 549; 2 Scott, N. R. 645, S. C.

(*n*) *Dix v. Otis*, 5 Pick. 38.

(*o*) *Preston v. Merceau*, 2 W. Bl. 1249. See the *Isabella*, 2 Rob. Adm. 241; *White v. Wilson*, 2 B. & P. 116; *Rich v. Jackson*, 4 Bro. Ch. R. 514; *Brigham v. Rogers*, 17 Mass. 571.

(*p*) *Pickering v. Dowson*, 4 Taunt. 779. See also *Powell v. Edmunds*, 12 East, 6; *Pender v. Fobes*, 1 Dev. & Bat. 250; *Wright v. Crookes*, 1 Scott, N. R. 685.

§ 830. So, if a promissory note be in its terms joint, evidence will not be allowed to be given that one of the parties was merely a surety (*q*) ; and where land, let for years, was sold by the lessor, a contemporaneous parol agreement, that the current quarter's rent should be apportioned between the vendor and purchaser, was held to be inadmissible (*r*). Again, if a party signs a bill of exchange, or, indeed, any written contract, in his own name, he cannot avoid his personal liability by giving parol evidence that he merely signed as the agent of another, and that the party with whom he contracted was aware of that fact (*s*) ; although, if the object be on the one hand to charge with liability (*t*), or, on the other to give the benefit of the contract to (*u*), the unnamed principal, such evidence will be received ; and this, too, whether the agreement be or be not required to be in writing by the Statute of Frauds. The distinction between these two cases is, that, in the former the parol evidence would clearly contradict the written agreement, but in the latter it would have no such effect ; for, without denying that the agreement was binding on the party whom it purported to bind, the evidence would merely go to show that another party, namely the principal, was also bound, on the well known doctrine that the act of an authorised agent is, in law, the act of the principal (*x*).

§ 831. Even the subsequent admission of the party as to the true intent and construction of the title-deed under which he claims, cannot be received in contradiction of the language therein contained (*y*). Thus, where a deed purported to convey a messuage in the occupation of A., *with the appurtenances*, and it appeared that A. had occupied a small adjoining garden with the house, the

(*q*) *Abbott v. Hendricks*, 1 M. & Gr. 794, per Tindal, C. J.

(*r*) *Flinn v. Calow*, 1 M. & Gr. 589.

(*s*) *Higgins v. Senior*, 8 M. & W. 834 ; *Sowerby v. Butcher*, 2 Cr. & Mee. 371 ; 4 Tyr. 320, S. C. ; *Magee v. Atkinson*, 2 M. & W. 440 ; *Jones v. Little Dale*, 6 A. & E. 486 ; 1 N. & P. 677, S. C. ; *Stackpole v. Arnold*, 11 Mass. 27 ; *Hunt v. Adams*, 7 Mass. 518 ; *Shankland v. City of Washington*, 5 Peters, 394 ; *Lefevre v. Lloyd*, 5 Taunt. 749 ; 1 Marsh. 318, S. C.

(*t*) *Paterson v. Gandasequi*, 15 East, 62 ; cited and confirmed in *Higgins v. Senior*, 8 M. & W. 844, per Parke, B.

(*u*) *Garrett v. Handley*, 4 B. & C. 664 ; *Bateman v. Phillips*, 15 East, 272 ; both cited and confirmed in 8 M. & W. 844, per Parke, B.

(*x*) *Higgins v. Senior*, 8 M. & W. 844, 845, per Parke, B.

(*y*) *Paine v. M'Intier*, 1 Mass. 69, as explained in 10 Mass. 461. See also *Townsend v. Weld*, 8 Mass. 146.

written conditions of sale excepting the garden, and the declarations of the grantee that he had not purchased it, were held inadmissible to contradict the plain language of the deed, under which the garden had clearly passed as appurtenant to the messuage (z).

§ 832. Still less will any statements made by the writer of the instrument be receivable in evidence with a view of varying its terms. Thus, where a testator devised to his eldest son his residence with the *buildings to the same adjoining*, and left to his second son all his other real property, declarations made by him, while giving instructions for his will, were rejected,—they being tendered to show that he intended the second son to have some cottages, which it was proved adjoined his residence at the time when the will was made (a). Again, it is well established, that where, in a will, a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator (b); and the principle, of course, is precisely the same, whether it be the person of the devisee, or the estate or thing devised, which is left altogether in blank (c).

§ 833. We shall close our observations on the rule under discussion, by adverting to the case of *Miller v. Travers* (d), which is the leading authority on the subject. There, the testator devised all his freehold and real estate “in the county of Limerick, and in the city of Limerick.” He had no real estates in the county of Limerick, but his landed property consisted of estates in the county of Clare, which were not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the testamentary charges. Under these circumstances the Court held, that the devisee could not be allowed to show by parol evidence, that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake he

(z) *Doe v. Webster*, 12 A. & E. 442; 4 P. & D. 270, S. C.

(a) *Doe v. Holtom*, 4 A. & E. 76.

(b) *Hunt v. Hort*, 3 Bro. C. C. 311; *Miller v. Travers*, 8 Bing. 253, 254, per Tindal, C. J.

(c) *Miller v. Travers*, 8 Bing. 254, per Tindal, C. J.

(d) 8 Bing. 244.

erased the words "county of Clare;" and that the testator, after keeping the will by him for some time, executed it without adverting to the alteration as to that county. "The plaintiff," said Chief Justice Tindal, in pronouncing the joint opinion of himself, Lord Lyndhurst, and Lord Chancellor Brougham (e), "contends that he has a right to prove that the testator intended to pass not only the estate in the city of *Limerick*, but an estate in a county not named in the will, namely, the county of *Clare*, and that the will is to be read and construed as if the word *Clare* stood in the place of, or in addition to, that of *Limerick*. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted" (f).

§ 834. The language of Chief Justice Tindal just cited leads naturally to the consideration of another rule, which we now proceed to point out and discuss. The rule is this; namely, that, although extrinsic parol evidence, contradicting, varying, adding to, or subtracting from, the contents of a valid written instrument, is inadmissible; first, because the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; and secondly, because of the mischiefs which would result, if verbal testimony were in such cases received; still, *parol evidence may in all cases of doubt be received, to explain the written instrument*; or, in other words, to enable the Court to discover the meaning of the terms employed, and to apply them to the facts (g). Now, it is obvious that the *doubt* here adverted to may arise from one or both of the two following

(e) Lord Lyndhurst, C. B., and Tindal, C. J., had been summoned to assist the Lord Chancellor in this case. (f) 8 Bing. 249, 250.

(g) *Shore v. Wilson*, 9 Cl. & Fin. 555, per Parke, B.

causes ; either the *language* of the instrument may be *unintelligible* to the Court, or, at least, be *susceptible of two or more meanings* ; or the *persons and things* mentioned therein *may require to be identified* (i). The rule, therefore, clearly embraces two descriptions of evidence, of which we purpose to treat in order.

§ 835. And first, there can be no doubt that if the characters, in which the instrument is written, are in short-hand, or are otherwise difficult to be decyphered,—or if the language, whether as being foreign, provincial, local, technical, or obsolete, is either not understood by the Court, or is capable of bearing two or more interpretations,—the evidence of persons skilled in decyphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expressions (k). The first branch of this rule has been acted upon in several cases, where wills, written in a scarcely legible hand, have been referred by Courts of Equity to the Master for examination, with directions that he should take to his assistance persons skilled in writing (l). The practice of proving translations of foreign documents is so notorious as to require no authority in support of it ; while the remainder of the rule is established beyond dispute by an absolute cloud of cases.

§ 836. Before we advert more particularly to these cases, it may be well to observe, that in resorting to evidence of *usage* for the meaning of particular words in a written instrument, no distinction exists between such words as are purely local or technical ;—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or trade, or by a particular class of persons ;—and words which have two meanings, the one common and universal, the other technical, peculiar, or local. In either case, extrinsic evidence

(i) 9 Cl. & Fin. 555, 556, per Parke, B. ; 566, 567, per Tindal, C. J.

(k) Id. ; Wigram on Wills, 48.

(l) Goblet v. Beechy, 3 Sim. 24 ; Wigram on Wills, 184, 196, S. C. ; Masters v. Masters, 1 P. Wms. 425 ; Norman v. Morrell, 4 Ves. 769.

of usage will alike be admissible to define and explain the technical, peculiar, or local meaning of the language employed; though in the latter case, it will also be necessary to prove such additional circumstances, as will raise a presumption that the parties intended to use the words in what logicians call their second intention, unless this fact can be inferred from reading the instrument itself. Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant, described the objects of her munificence as "Godly preachers of Christ's Holy Gospel," and it became necessary to determine a few years ago what persons were entitled to the charity,—extrinsic evidence was admitted to show, that at that period of history a religious sect existed, who applied this particular phraseology, capable though it seemed at first sight of a far wider interpretation, to Protestant Trinitarian dissenters, and that the founder was herself a member of such sect (*m*).

§ 837. So the words, "inhabitant" (*n*),—"level" (*o*), as understood by miners,— "thousand" (*p*), as locally applied to rabbits on a warren,— "weeks," as used in a theatrical contract (*q*),—"days," as meaning working days in a bill of lading (*r*),—"fur" (*s*),—"freight" (*t*),—and many other expressions, which *primâ facie* presented no ambiguity, have been interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were *usually* received, when employed in cases similar to that under investigation (*u*). So, the meaning of the phrase, "duly honoured," when applied to a bill of exchange (*x*),—of the words "in turn to deliver," contained

(*m*) *Shore v. Wilson*, 9 Cl. & Fin. 355, 580, per Lord Cottenham. See also, *Att.-Gen. v. Drummond*, 1 Dru. & War. 353; and 7 & 8 Vict. c. 45, noticed *ante*, § 61.

(*n*) *R. v. Mashiter*, 6 A. & E. 153; *R. v. Davis*, *id.* 386.

(*o*) *Clayton v. Gregson*, 5 A. & E. 302.

(*p*) *Smith v. Wilson*, 3 B. & Ad. 728; recognised by Williams, J., in *Shore v. Wilson*, 9 Cl. & Fin. 543.

(*q*) *Grant v. Maddox*, 16 L. J. N. S. Ex. 227.

(*r*) *Cochran v. Retberg*, 3 Esp. 121.

(*s*) *Astor v. Union Ins. Co.*, 7 Cowen, 202.

(*t*) *Feisch v. Dickson*, 1 Mason, 11, 12; *Gibbon v. Young*, 2 B. Moore, 224;

Lewis v. Marshall, 7 M. & Gr. 729, 743, 744; 8 Scott, N. R. 477.

(*u*) See *Lewis v. Marshall*, 7 M. & Gr. 729, and cases collected at p. 738 of that report.

(*x*) *Lucas v. Groning*, 7 Taunt. 164.

15th 8th 787. 2c.

in a charter-party, (*u*),—and of the expression, “in the month of October,” as fixing the part of the month, within which a vessel was to sail (*x*),—has been ascertained by parol evidence of mercantile usage. So, where a ship was warranted “to depart with convoy,” extrinsic evidence was admitted to show at what place convoy for such a voyage as the one then contemplated was usually taken; and to that place the parties were presumed to refer (*y*). Again, where one of the subjects of a charter-party was “cotton in bales,” oral evidence of the mercantile meaning of this term was received (*z*); and it has been proved by similar testimony, that the words, “expected to arrive about November next,” when used in a bought note, created no contract as to time, but were a mere representation (*a*). So parol evidence has been admitted to show, that, by usage in the hop trade, a sale of “ten pockets of Kent hops at 5*l*,” means 5*l*. per cwt. (*b*). So, where goods having been sent to a London packer to prepare for exportation, he acknowledged their receipt “on account of the vendor for the vendee,” evidence of usage was admitted to prove, that, when packers signed receipts in this form, it was their duty not to part with the goods without the vendor’s further orders (*c*). So, also, where an Irish corn-merchant had sent written instructions to his *del credere* agent in London, to sell some oats “*on his account*,” parol evidence was held admissible on the agent’s part, for the purpose of showing that, by the custom of the London corn trade, he was warranted under these instructions in selling in his own name (*d*).

§ 838. The reports contain many cases, where the language of *policies* has been explained by evidence of the understood practice of making voyages in particular branches of trade (*e*). For

(*u*) *Robertson v. Jackson*, 2 Com. B. 412.

(*x*) *Chaurand v. Angerstein*, Pea. R. 43. See also *Robertson v. Jackson*, 2 Com. B. 412; *U. S. v. Breed*, 1 Sumn. 159.

(*y*) *Lethulier’s case*, 2 Salk. 443; recognised by *Williams, J.*, in *Shore v. Wilson*, 9 Cl. & Fin. 543.

(*z*) *Taylor v. Briggs*, 2 C. & P. 525.

(*a*) *Bold v. Rayner*, 1 M. & W. 343; Tyr. & Gr. 820, S. C.

(*b*) *Spicer v. Cooper*, 1 Q. B. 424; 1 G. & D. 52, S. C.

(*c*) *Bowman v. Horsey*, 2 M. & Rob. 85, per Lord Abinger.

(*d*) *Johnston v. Usborne*, 11 A. & E. 549.

(*e*) See *Trueman v. Loder*, 11 A. & E. 600; and *Milward v. Hibbert*, 3 Q. B. 135, 137.

instance, though, according to the general import of the words "at and from," a policy would attach upon the ship's first mooring in a harbour on the coast; yet where these expressions were employed in a Newfoundland policy, they were explained by evidence of usage to mean, that the risk should not commence till the expiration of the fishing, technically called *banking*, or of an intermediate voyage (*f*). In all cases of this kind, it is unnecessary for the assured or his broker to communicate the usage to the underwriter, because, as Lord Mansfield has observed, "every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself" (*g*).

§ 839. But though *evidence of usage* may be admissible to explain what is doubtful, it is *not admissible to contradict or vary what is plain* (*h*); and therefore, if the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense, will be rejected; unless the words, if interpreted according to their strict legal acceptance, be wholly insensible with reference, either to the context, or to the extrinsic facts (*i*). Thus, if a word denoting weight, measure, or number, has had a definite meaning attached to it by the Legislature, parties using that word in a written contract, will be conclusively presumed to have used it in such sense, unless the contrary clearly appears from some part of the writing itself (*k*). It seems, too, that, since the act of parliament passed for altering the style, the words, Lady Day and Michaelmas, if used in a lease, have respectively been presumed to mean the

(*f*) *Vallance v. Dewar*, 1 Camp. 503, 508, per Lord Ellenborough; *Ougier v. Jennings*, id. 505, 506, n. per Lord Eldon; *Kingston v. Knibbs*, id. 508, per Lord Ellenborough.

(*g*) *Noble v. Kennaway*, 2 Doug. 513; cases cited in last note; *Da Costa v. Edmunds*, 4 Camp. 143, per Lord Ellenborough.

(*h*) *Blackett v. Roy. Ex. Ass. Co.*, 2 Cr. & J. 249, 250, per Lord Lyndhurst.

(*i*) *Wigram on Wills*, 11, 12, cited ante, § 812, n. (*h*).

(*k*) *Smith v. Wilson*, 3 B. & Ad. 731—734, per Lord Tenterden and Parke, J.; *Hockin v. Cooke*, 4 T. R. 314; *Att.-Gen. v. Cart Plate Glass Co.* 1 Anstr. 39; *Noble v. Durell*, 3 T. R. 271; *Sleght v. Rhineland*, 1 Johns. 192; *Frith v. Barker*, 2 Johns. 335; *Stoever v. Whitman*, 6 Binn. 417; *Henry v. Risk*, 1 Dall. 465.

25th of March and the 29th of September; and no parol evidence of the custom of the country is admissible to show, that the parties used these words with reference to the old style (*l*). In several cases, however, of parol demises, such evidence has been received (*m*); but whether the distinction hitherto drawn between a letting by deed, and a letting by parol, would now be sustained, may admit of a serious doubt. Again, on a warranty of prime singed bacon, evidence of a practice in the trade, to receive bacon slightly tainted as prime singed, has been rejected (*n*). So, where a policy was made in the usual form, upon the ship, her tackle, apparel, boats, &c., evidence of usage, that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible (*o*). So parol evidence has been rejected, when tendered for the purpose of proving, that the words "glass ware in casks," contained in the memorandum of excepted articles in a fire policy, meant, according to the understanding of insurers and insured, such ware in open casks only (*p*). So also, where a bill of lading contained the usual clause, "the dangers of the sea only excepted," the Court held, that the shipowners could not rely on an established custom in the trade, that persons in their position should only be liable for damages occasioned by their own neglect, provided they saw the merchandise properly secured and stowed (*q*).

§ 840. Again, where goods had been sold through a London broker under a written contract, which stipulated that payment should be made by bills, Lord Ellenborough rejected evidence of a custom, that *bills* meant *approved* bills, and that the vendor had the option of rejecting any bill of which he disapproved (*r*); and, although the same learned judge, in a subsequent stage of the case admitted evidence of a usage of trade, which reserved to

(*l*) Doe v. Lea, 11 East, 312.

(*m*) Doe v. Benson, 4 B. & A. 588; Furley v. Wood, 1 Esp. 198, per Lord Kenyon. (*n*) Yates v. Pym, 6 Taunt. 446.

(*o*) Blackett v. Roy. Ex. Ass. Co., 2 Cr. & J. 244.

(*p*) Bend v. Georgia Ins. Co., Sup. Ct., N. York, 1842.

(*q*) The Schooner Reeside, 2 Sumn. 567.

(*r*) Hodgson v. Davies, 2 Camp. 532, approved of by Lord Denman in Trueman v. Loder, 11 A. & E. 599.

vendors, selling through brokers in the manner above stated, the power of annulling the contract, within a reasonable time after the name of the purchaser had been communicated to them,—serious doubts may be entertained whether he was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as, in the absence of express words, to be incorporated in it (*s*).

§ 841. It cannot, however, be asserted, that parol evidence of usage or custom is confined to cases where the written instrument is expressed in ambiguous technical language; for it is certainly sometimes admissible “*to annex incidents*,” as it is termed,—that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instance, though a bill of exchange or promissory note is silent as to any days of grace, parol evidence of the known and established usage of the country or place, where the bill or note is payable, is admissible to show on what day the grace expired (*t*). So, it may be proved by parol,

(*s*) *Hodgson v. Davies*, 2 Camp. 531, questioned by Lord Denman in *Trueman v. Loder*, 11 A. & E. 599.

(*t*) *Renner v. Bk. of Columbia*, 9 Wheat. 581, where the decisions on this point are reviewed by Thompson, J. The following table, copied from Mr. Chitty's large work on Bills of Exchange, p. 374—376, may be found of practical use; though we cannot pledge ourselves to its entire accuracy:—

<i>Altona</i>	Sundays and holidays included, and bills falling due on a Sunday or holiday must be paid, or in default thereof protested, on the day previous	12 days.
<i>America</i>		3 days.
<i>Amsterdam</i>	Abolished since the Code Napoleon	none.
<i>Antwerp</i>	Abolished by the Code Napoleon	none.
<i>Berlin</i>	When bills including them do not fall due on a Sunday or holiday, in which case they must be paid or protested the day previous	3 days.
<i>Brazil</i>	Rio de Janeiro, Bahia, including Sundays, &c., as in the last case	15 days.
<i>England, Scotland, Wales, and Ireland</i>		3 days.
<i>France</i>	Abolished by the Code Napoleon, Livre i. tit. 8, § 5, pl. 135; 1 Pardess. 189. 10 days were formerly allowed; Poth. pl. 14, 15	none.
<i>Frankfort-on-the-Maine</i>	Except on bills drawn at sight, Sundays and holidays not included	4 days.

that it is the custom for persons employed in particular trades, under general contracts of hiring and service, to have certain

<i>Genoa</i>	Abolished by the Code Napoleon	none.
<i>Hamburgh</i>	Same as Altona	12 days.
<i>Ireland</i>		3 days.
<i>Leghorn</i>		none.
<i>Lisbon and Oporto</i>	15 days on local, and 6 on foreign bills; but if not previously accepted, must be paid on the days they fall due	6 days, or 15 days.
<i>Naples</i>	Abolished by the Code Napoleon	none.
<i>Palermo</i>		none.
<i>Petersburgh</i>	Bills drawn after date are entitled to 10 days' grace, those drawn at sight to only 8 days, and those at any number of days after sight none whatever. But bills received and presented after they are due, are nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holidays, as also the day when the bill falls due, on which days they cannot be protested for non-payment, but on the morning of the last day of grace payment must be demanded, and if not complied with, the bill must be protested before sunset	10 days, 3, &c.
<i>Rio De Janeiro, Bahia, and other parts of Brazil</i>	Days of grace on foreign bills are 15, including holidays and Sundays, and if due on any such day, must be paid, or in default thereof protested, on the previous day	15 days.
<i>Rotterdam</i>	Abolished by the Code Napoleon	none.
<i>Scotland</i>		3 days.
<i>Spain</i>	Vary in different parts of Spain, generally 14 days on foreign, and 8 on inland bills; at Cadiz only 6 days' grace. When bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace; nor any bills, unless accepted prior to maturity	14 days, but vary.
<i>Trieste</i>	3 days on bills drawn after date, or any term after sight not less than 7 days, or payable on a particular day; but bills presented after maturity must be paid within 24 hours. Sundays and holidays are included in the days of grace, and if the last day of grace fall on such a day, payment must be made, or the bill protested, on the first following open day	3 days.
<i>Venice</i>	6 days, in which Sundays, holidays, and the days when the bank is shut, are not included	6 days.
<i>Vienna</i>	Same as Trieste	3 days.
<i>Wales</i>		3 days.

holidays in the year, and the Sundays to themselves (*u*). So, it may be shown by parol, that a heriot is due by custom on the death of a tenant for life, though it is not expressed in the lease (*x*). So, a lessee by deed may show, that, by the custom of the country, he is entitled to an away-going crop, though no such right is reserved in the deed (*y*). So, where a horse had been sold by private contract at a repository with a written warranty of soundness, and the purchaser afterwards brought an action against the seller, the horse turning out to be unsound, the defendant was permitted to show that, by one of the printed regulations hung up in the repository, warranties were only to remain in force till twelve o'clock on the day after the sale; and then, upon further proof, that the plaintiff was aware of this regulation, and yet made no complaint within the specified time, a nonsuit was directed to be entered (*z*).

§ 842. This rule of annexing incidents by parol, which, time out of mind, has been adopted in explanation of mercantile proceedings, and is now generally applied to contracts respecting any transaction wherein known usages have prevailed, rests on the presumption, that the parties did not intend to express in writing the whole of the agreement, by which they were to be bound, but only to make their contract with reference to the established usages and customs relating to the subject matter (*a*). But here, as in all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be *not repugnant to or inconsistent with* the contract; for otherwise, it would not go to interpret and explain, but to contradict, what is written (*b*). In order to establish an inconsistency between the written agreement and the custom, it is not necessary that the former should *in express terms*

(*u*) *R. v. Stoke-upon-Trent*, 5 Q. B. 303. (*x*) *White v. Sayer*, Palm. 211.

(*y*) *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Bligh, 287, S. C.; *Senior v. Armitage*, Holt's N. P. R. 197, explained by Parke, B., in 1 M. & W. 476; *Hutton v. Warren*, 1 M. & W. 466; Tyr. & Gr. 646, S. C.

(*z*) *Bywater v. Richardson*, 1 A. & E. 508; 3 N. & M. 748, S. C. See *Smart v. Hyde*, 8 M. & W. 723.

(*a*) *Hutton v. Warren*, 1 M. & W. 475, per Parke, B.

(*b*) *Holding v. Pigott*, 7 Bing. 465, 474; 5 M. & P. 427, S. C.; *Clarke v. Royston*, 13 M. & W. 752; *Yeats v. Pim*, Holt, N. P. R. 95; nom. *Yates v. Pym*, 6 Taunt. 446, S. C.; *Trueman v. Loder*, 11 A. & E. 589; 3 P. & D. 267, S. C.

exclude the latter; but if it can be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by the custom, no evidence respecting it can be received (c). For instance, suppose the custom of the country should require that the tenant should plough sow and manure a certain portion of the demised land in the last year, and should entitle him, on quitting, to receive from the landlord a reasonable compensation for his labour seeds and manure; evidence of such a custom would be rejected, had the tenant covenanted to plough sow and manure in accordance with the custom, he being paid on quitting for the *ploughing*; because here the principle *expressum facit cessare tacitum* would apply, and the language of the lease would be deemed equivalent to a stipulation, that the lessor should pay for the ploughing, and *no more* (d).

§ 843. In order to constitute such a custom or usage, as will be admissible in evidence to explain the terms of a written instrument, it is not necessary that it should have been *immemorial*, or even established for a considerable period, or *uniform*, or capable of being defined with precision and accuracy. Thus, "the custom of the country" with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie (e); and the general usage of trade may be imported into a contract, though proof has been given of exceptions to such usage (f). So, although a particular branch of trade has been only established for a year or two, parties connected with that trade will be presumed to have contracted, with reference to the usages generally adopted since its existence (g). But in all these cases it must be carefully borne in mind, that it is not the judgment and opinion of the witnesses, but the *fact* of a general usage or practice prevailing in the particular trade or business, which is admissible in evidence: and

(c) *Hutton v. Warren*, 1 M. & W. 477, per Parke, B. See *Clarke v. Roystone*, 13 M. & W. 752. (d) 1 M. & W. 477, 478; *Webb v. Plummer*, 2 B. & A. 746.

(e) *Legh v. Hewitt*, 4 East, 154, 159, per Lord Ellenborough; *Dalby v. Hirst*, 1 B. & B. 224, 227, 228; 3 Moore, 536, S. C.

(f) *Vallance v. Dewar*, 1 Camp. 508, per Lord Ellenborough.

(g) *Noble v. Kennoway*, 2 Doug. 513, per Lord Mansfield; *Robertson v. Jackson*, 2 Com. B. 412.

unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight (*h*).

§ 844. Whenever evidence of usage is adduced, whether it be for the purpose of explaining the technical language of an instrument, or of annexing incidents to it, the party against whom it is offered is always at liberty to prove,—either first, the non-existence of the usage,—or secondly, its illegality or unreasonableness,—or thirdly, that, in fact, it formed no part of the agreement between the parties (*i*). Indeed, if there be any reason to believe that the opposite party will rely upon usage, the evidence on these points may be given by way of *anticipation*. For instance, where the owner of goods brought an action of assumpsit against a carrier by sea, for non-delivery of the goods to him at the port of London, and the defendant pleaded that he had delivered them at that port,—it was held first by the Court of Exchequer Chamber (*k*), and then by the House of Lords (*l*), that the plaintiff might prove former dealings between himself and the defendant respecting the carriage of other goods from the defendant's London wharf to the plaintiff's place of business; inasmuch as such evidence was offered, not for the purpose of extending or narrowing the contract, or in any way changing it, but with the sole view of meeting a case, which might be made on the other side to establish a custom of delivery at a wharf. The fact that the evidence consisted of instances of individual contracts, might be open to observation, but the evidence could not be rejected on that ground (*m*); and Lord Brougham observed, "A party may properly in this way anticipate objections, and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out" (*n*).

§ 845. Before quitting this subject, we cannot refrain from

(*h*) *Lewis v. Marshall*, 7 M. & Gr. 744, 745, per Tindal, C. J.

(*i*) *Bourne v. Gatcliffe*, 3 M. & Gr. 684, per Alderson, B.; *Bottomley v. Forbes*, 5 Bing. N. C. 127, 128, per Tindal, C. J.

(*k*) *Bourne v. Gatcliffe*, 3 M. & Gr. 643, 689; 3 Scott, N. R. 1, S. C.

(*l*) *Id.*, 11 Cl. & Fin. 45, 49, 69—71; 7 M. & Gr. 850, 865, 866, S. C.

(*m*) 11 Cl. & Fin. 70, per Lord Lyndhurst, C.; 7 M. & Gr. 865, S. C.

(*n*) 11 Cl. & Fin. 71; 7 M. & Gr. 866, S. C.

stating our conviction, that much injustice is frequently occasioned by the lax habit of admitting evidence of usage, which, though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it which was never contemplated by the parties themselves, and which is utterly at variance with their real intentions. In this view we are confirmed by some of the highest legal authorities both in England and America. In *Hutton v. Warren* (o), though the judges of the Court of Exchequer yielded, as they were bound to do, to the precedents cited, they threw out a pretty clear intimation of their opinion, that, where formal agreements had been entered into, and especially instruments under seal, the relaxation of the strictness of the common law, which arose from the admission of evidence of usage, was unwise and unjust; and the same opinion has been expressed more than once by the Court of Queen's Bench (p). "If," said Lord Denman, in pronouncing the opinion of the Court on one occasion, "a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts, while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and supposing all these

(o) 1 M. & W. 475.

(p) *Johnston v. Usborne*, 11 A. & E. 557; *Trueman v. Loder*, id. 597.

difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom"(q).

§ 846. The late Mr. Justice Story has also expressed the same sentiments; and as all the observations of that great and good judge deserve especial respect, no apology seems necessary for inserting the following passage from one of his judgments (r):—"I own myself," said he, "no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find, that, of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. But I apprehend, that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, à fortiori, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled,

(q) *Trueman v. Loder*, 11 A. & E. 597, 598.

(r) *The Schooner Reeside*, 2 Sumn. 567.

or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties."

§ 847. Besides the evidence of usage, strictly so called, it seems that where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses, present at the time of making the agreement, may be called to explain that which is *per se* unintelligible; such explanation not being inconsistent with the written terms (*s*). On one or two occasions, even conversations between the parties when the contract was being made, have been received, in proof of the sense which they attached to the ambiguous expressions (*t*). The principle, however, of these cases, is not very clear, and no great weight should, in prudence, be attached to them (*u*).

§ 848. Passing now to the consideration of the second description of evidence, which is admissible in explanation of written instruments, it may be laid down as a broad and distinct rule of law, that *extrinsic evidence* of every *material fact*, which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers, must of necessity be received (*x*). Whatever may be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter (*y*).

(*s*) *Sweet v. Lee*, 3 M. & Gr. 452, 460.

(*t*) *Birch v. Depeyster*, 1 Stark. R. 210, per Gibbs, C. J.; *Gray v. Harper*, 1 Story R. 574; *Selden v. Williams*, 9 Watts, 9.

(*u*) See *Smith v. Jeffries*, 15 M. & W. 561.

(*x*) *Doe v. Hiscocks*, 5 M. & W. 367, 368, per Lord Abinger; *Shore v. Wilson*, 9 Cl. & Fin. 556, per Parke, B.; *Wigram on Wills*, 51; *Doe v. Martin*, 4 B. & Ad. 771, 785, 786, per Parke, J.; 1 N. & M. 512, S. C.; *R. v. Wooldale*, 6 Q. B. 549, 565, per Coleridge, J.

(*y*) *Shore v. Wilson*, 9 Cl. & Fin. 556, per Parke, B.; *Doe v. Martin*, 1 N. &

With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument (*z*). In the simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed by the designation of Blackacre, parol evidence must be admitted to show what property is known by that name; and if a testator devise a house purchased of A., or a farm in the occupation of B., it must be shown by extrinsic evidence, what house was purchased of A., or what farm was in B.'s occupation, before it can be known what is devised (*a*).

§ 849. Again, to put instances somewhat more complex, if the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings, or circumstances; or if the terms be vague and general, or have divers meanings; parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect. Thus, if the Court has to determine whether a bequest of *stock* is specific or pecuniary, it will not only look to the context of the will, and the terms of the gift, as compared with those of the other bequests, but it will also receive evidence of the state of the testator's funded property (*b*). In the case of *Goblet v. Beechey* (*c*), the controversy turned on the word "mod," as used in the following codicil of the distinguished sculptor Nollekens. "In case of my death, all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," &c., "shall be the property of Alex. Goblet." The plaintiff contended that the word meant model; the defendant, who was the executor,

M. 524, per id.; *Guy v. Sharpe*, 1 Myl. & K. 602, per Lord Brougham; *Wigram on Wills*, 76, 77.

(*z*) *Sweet v. Lee*, 3 M. & Gr. 466, per Tindal, C. J.; *Att.-Gen. v. Drummond*, 1 Dru. & War. 367, per Sugden, C.; *Blundell v. Gladstone*, 1 Phill. 282, 283.

(*a*) *Sanford v. Raikes*, 1 Mer. 653, per Sir W. Grant; *Clayton v. Lord Nugent* 13 M. & W. 207, per Rolfe, B.

(*b*) *Att.-Gen. v. Grote*, 2 Russ. & M. 699, per Lord Eldon; *Wigram on Wills*, 201, 202, S. C.; *Boys v. Williams*, 2 Russ. & M. 689, per Lord Brougham.

(*c*) 3 Sim. 24; *Wigram on Wills*, 185, S. C.

urged, that either it was an abbreviation for "moulds," or that it should be read in connexion with the words which immediately followed it, and meant "modelling tools for carving." On the one hand it was proved, that the legatee had been in the testator's service for thirty years, and was highly esteemed by him as one of his best workmen; and statuary was called to prove that there were no such tools as modelling tools for carving, but that the word "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in the codicil were of trifling value; and he further gave in evidence, that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. Reading the codicil by the light of this extrinsic evidence, Vice-Chancellor Shadwell came to a decision, that the word in question sufficiently described the testator's models; and although this decree was subsequently reversed by Lord Brougham, the reversal rested, not on the inadmissibility of any portion of the evidence, but on the ground that the models had been distinctly bequeathed by the will to another party, and that the meaning of the codicil was involved in too much obscurity to justify its operating as a revocation of the prior bequest (*d*).

§ 850. In many other cases of testamentary dispositions, one construction would be given to particular words, if children were living at the time the will was executed; and another construction, if there were no children living at that period; and here it is obvious, that unless the Court is first made acquainted with the circumstances surrounding the testator, it cannot with safety undertake to construe the will (*e*). So, if a man makes a settlement for his children, in which there is some ambiguity, it will be impossible for the Court to solve the doubt, until evidence has been adduced respecting the state of the family of the settlor, and the circumstances in which he was placed in relation to the property dealt with (*f*). So, where a house, a mill, a factory, or

(*d*) 2 Russ. & My. 624.

(*e*) Per Sugden, C., in *Att.-Gen. v. Drummond*, 1 Dru. & War. 367. (*f*) *Id.*

a farm, has been conveyed *eo nomine*, and the question is as to what was part and parcel thereof, and so passed by the deed, parol evidence showing the situation and limits of the property, the manner in which it was acquired, or occupied, and the like, will be always admissible (g).

§ 851. It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the Courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it. Thus, where certain premises were leased, including a yard described by the metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show, that, at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease (h). So, where a fine had been levied for twenty acres of land and twelve messuages in Chelsea, evidence was admitted to show, that, though the conusor's estate at Chelsea was under twenty acres, he had nineteen houses on it; and as, read in connexion with these facts, the language of the fine was ambiguous, further proof was received as to what particular part of the property was intended to be included in it (i). Again, an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary Beynon had two legitimate daughters, namely, Mary and Ann, and a younger illegitimate child, named Elizabeth. Thus, two persons only were in existence, who correctly answered the description in the devise; yet still Elizabeth, the illegitimate daughter, might have been included therein, had it clearly appeared that the testator so intended. In

(g) *Doe v. Martin*, 4 B. & Ad. 785, per Parke, J.; *Doe v. Burt*, 1 T. R. 704, per Buller, J.; *Ropps v. Barker*, 4 Pick. 239; *Farrar v. Stackpole*, 6 Greenl. 154.

(h) 2 Poth. on Obl. by Evans, 185; *Doe v. Burt*, 1 T. R. 701.

(i) *Doe v. Wilford*, 1 C. & P. 284; Ry. & M. 88, S. C.; *Denn v. Wilford*, 2 C. & P. 173.

order, however, to rebut her claim, extrinsic evidence was admitted, which showed that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who was born in the order stated in the will; and that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances the jury were held to have rightly decided, that the illegitimate daughter Elizabeth was not entitled to the devise in question (*k*).

§ 852. So, also, if an order of removal has been quashed generally by the Sessions, the removing parish on the trial of an appeal against a subsequent order of removal, may show by parol evidence the state of things when the first order was quashed, and that the Sessions in quashing it intended to pronounce no decision on the merits of the settlement (*l*). For although an order of Sessions quashing an order of removal is *prima facie* evidence, that the pauper was not settled in the appellant parish (*m*),—yet, as the decision may have proceeded, either on that ground, or on the ground that the pauper was then not chargeable, or was irremovable, and as the language of the order of Sessions is consistent with any one of these hypotheses, it must be competent for the respondents to prove the particular ground on which the decision rested (*n*).

§ 853. But although evidence of all the circumstances, which surrounded the author of a written instrument, will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the *language* of the instrument, as explained by the extrinsic evidence; and no proof, however conclusive in its nature, can be admitted, with the view of setting up an intention inconsistent with the known meaning of the writing

(*k*) *Doe v. Beynon*, 12 A. & E. 431; 4 P. & D. 198, S. C.

(*l*) *R. v. Wick St. Lawrence*, 5 B. & Ad. 526, 537; *R. v. Wheelock*, 5 B. & C. 511; *R. v. Perranzabuloe*, 3 Q. B. 400, 402, per Patteson, J.; *R. v. Flintshire*, 1 New Sess. Cas. 288; 2 Dowl. & L. 143, S. C.

(*m*) *R. v. Wick St. Lawrence*, 5 B. & Ad. 535, per Parke, J.; *R. v. Yeoveley*, 8 A. & E. 818, per Lord Denman.

(*n*) *R. v. Wick St. Lawrence*, 5 B. & Ad. 533, per Lord Denman, 535, per Parke, J.

itself. For, the duty of the Court in all these cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words they have used (*o*). It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument in its operation to the established rules of law (*p*).

§ 854. In no case therefore, except, as will be presently pointed out (*q*), where there are two or more subjects, to either of which the description in the document would equally apply (*r*), or where the object is to rebut an equity, is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer; but, in all cases alike, the Court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context, and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show, that in fact they used it in any other sense, or had any other intention (*s*). For instance (*t*), parol evidence has repeatedly been rejected, when tendered to show, what persons a testator meant to include or exclude in employing the word "relations" (*u*); what articles

(*o*) *Doe v. Gwillim*, 5 B. & Ad. 129, per Parke, J.; *Doe v. Martin*, 4 B. & Ad. 786, per id.; 1 N. & M. 524, S. C.; *Shore v. Wilson*, 9 Cl. & Fin. 525, per Coleridge, J.; 556, per Parke, B.; 566, per Tindal, C. J.; *Beaumont v. Field*, 2 Chitty's R. 275, per Abbott, C. J.; *Richardson v. Watson*, 4 B. & Ad. 800, per Parke, J.; *Rickman v. Carstairs*, 5 B. & Ad. 662, 663, per Lord Denman.

(*p*) See Lieber's *Legal and Polit. Hermeneutics*, c. 1, § 8, and c. 3, §§ 2, 3; *Doct. & Stu.* 39, c. 24.

(*q*) *Post*, §§ 856, 868.

(*r*) *Shore v. Wilson*, 9 Cl. & Fin. 557, per Parke, B.

(*s*) *Id.* 525, per Coleridge, J.; 556, per Parke, B.; 565, 566, per Tindal, C. J.

(*t*) For other instances, see *ante*, §§ 831, 832.

(*u*) *Goodinge v. Goodinge*, 1 Ves. Sen. 230; *Edye v. Salisbury*, Amb. 70; *Green v. Howard*, 1 Bro. C. C. 31.

he intended to give by the word "plate" (*x*); what property he thought he devised by the expression, "lands out of settlement" (*y*); and the like (*z*); for in all these cases, as the legal signification of the language used was plain, it mattered not in point of law what the testator intended; the sole question being, non quod voluit, sed quod dixit (*a*). Indeed, if this were not the rule of law, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of a particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to benefit under it, might be set up to contradict or vary the plain language of the instrument itself (*b*).

§ 855. Though declarations of intention, except in the cases before alluded to, cannot be received in evidence to explain an ambiguity in a written instrument, yet, if the instrument be an *ancient* one, it seems that the *acts* of the author may be given in evidence in aid of its construction. Thus, in the case of the Attorney-General *v.* Brazennose College (*c*), the House of Lords appear to have considered, that proof of the application of the funds of an ancient charity by the original founder, and first trustee, was strong evidence of intention, and might be so treated by the Court in construing the grant itself. So, in the case of the Attorney-General *v.* Drummond (*d*), Lord Chancellor Sugden, while acknowledging that he could not receive evidence of the declarations of the founder of an ancient charity, either against, or in favour of, his grant, held that he was clearly entitled to inquire as to what acts the founder had done in relation to the charity; and his Lordship observed, that one of the most settled rules of law for the construction of ambiguities in ancient instruments

(*x*) *Nicholls v. Osborn*, 2 P. Wms. 419; *Kelly v. Powlet*, Amb. 605.

(*y*) *Strode v. Russell*, 2 Vern. 621.

(*z*) See other instances collected in *Wigram on Wills*, 88—92.

(*a*) *Shore v. Wilson*, 9 Cl. & Fin. 558, 559, per Parke, B.

(*b*) *Id.* 566, per Tindal, C. J.

(*c*) 2 Cl. & Fin. 295.

(*d*) 1 Dru. & War. 353, 366, 375, 376.

was, that the Court might resort to contemporaneous usage to ascertain the meaning of the deed. "Tell me," said he, "what you have done under such a deed, and I will tell you what that deed means" (e). Lord Chief Justice Tindal, also, has declared, that, for the purpose of ascertaining the sense of an old charity grant, evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed," was certainly admissible (f).

§ 856. Besides general proof of all the facts and circumstances, respecting the persons or things to which the instrument relates, which is undoubtedly legitimate, and often necessary, evidence, in order to enable the Court to understand the meaning and application of the language employed, there is, as before mentioned (g), a particular class of cases, in which the *declarations* of the writer of the instrument *will be receivable in evidence*; namely, *where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty, to two or more persons or things*. The doctrine on this subject has been lucidly explained by Lord Abinger, in an important will cause in the Exchequer (h). After stating the general rule that the meaning of a will may be explained by evidence of all the circumstances surrounding the testator, his Lordship goes on to observe,—“ But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is *but one case* (i), in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but,

(e) 1 Dru. & War. 368.

(f) *Shore v. Wilson*, 9 Cl. & Fin. 569. See 7 & 8 Vict., c. 45, § 2, cited ante, § 61.

(g) Ante, § 854.

(h) *Doe v. Hiscocks*, 5 M. & W. 363.

(i) As to rebutting an equity, see post, §§ 868—870.

from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will" (*k*).

§ 857. In conformity with the rule thus laid down, it has been decided, that, where a testator had devised one house "to George Gord, the son of George Gord;" another "to George Gord, the son of John Gord;" and a third, after the expiration of certain life estates, "to George Gord, the son of Gord;" evidence of his declarations was admissible to show, that the person meant to be designated by the last description was George, the son of *George* Gord (*l*). So, where the devise was "to John Allen, the grandson of my brother Thomas, and I charge the same with the payment of 100*l*. to each and every the brothers and sisters of the said John Allen;" and it appeared that, at the date of the will, the testator's brother Thomas had two grandsons named John Allen, one having several brothers and sisters, and the other having one brother and one sister; the Court received evidence of the declarations of the testator, to show which grandchild was intended (*m*). So, where lands were left to John Cluer, of Calcot, and there were

(*k*) *Doe v. Hiscocks*, 5 M. & W. 368, 369.

(*l*) *Doe v. Needs*, 2 M. & W. 129; *Doe v. Morgan*, 1 Cr. & Mee. 235.

(*m*) *Doe v. Allen*, 12 A. & E. 461; 4 P. & D. 220, S. C.

father and son of that name, parol evidence of the testator's intention to leave them to the son, was held admissible (n).

§ 858. Where declarations of intention are receivable in evidence, the rule most consistent with modern authorities seems to be, that their admissibility does not depend upon the *time* when they were made. Contemporaneous declarations will certainly be entitled, *ceteris paribus*, to greater weight than those made before or after the execution; but, in point of law, no distinction can be drawn between them (o); unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by the instrument written by him, were simply to refer to what he intended to do, or wished to be done, at the time of speaking (p). Neither will the admissibility of declarations rest on the *manner* in which they were made, or on the *occasions* which called them forth; for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to the impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will of course vary materially according to the time and circumstances (q).

§ 859. Though declarations of intention are, as above stated, inadmissible, except for the purpose of explaining a latent ambiguity in the instrument, this rule will not preclude mere *collateral statements* made by the author of the instrument respecting the persons or things mentioned therein. For instance, to take the case of a will, the testator may have habitually called certain persons or things by *peculiar names*, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to

(n) *Jones v. Newman*, 1 W. Bl. 60; explained in *Doe v. Hiscocks*, 5 M. & W. 370.

(o) *Doe v. Allen*, 12 A. & E. 455, per Lord Denman, as to *subsequent* declarations; *Doe v. Hiscocks*, 5 M. & W. 369, per Lord Abinger, as to *previous* declarations. See *contra* *Thomas v. Thomas*, 6 T. R. 671; *Strode v. Russell*, 2 Vern. 625.

(p) *Whitaker v. Tatham*, 7 Bing. 628.

(q) *Trimmer v. Bayne*, 7 Ves. 518, per Lord Eldon.

show the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will (*r*). Thus, in *Blundell v. Gladstone* (*s*), where the question was, whether the second son of *Joseph Weld*, of Lulworth, was the party beneficially entitled under a devise in trust for "the second son of *Edmond Weld*, of Lulworth, Esq.," parol evidence was admitted to show that the testator had, on several occasions, even after correction, called the possessor of Lulworth "Edmond." The recent case of *Lee v. Pain* (*t*) affords a good illustration of this doctrine. There a testatrix, by a codicil dated in 1836, had bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, 200*l.* each." These legacies were claimed by a Mrs. Washbourne and her daughter. It appeared in evidence that Mrs. Washbourne was the daughter of the Rev. J. Bowden, who died in 1812, and the widow of the Rev. D. Washbourne, a dissenting minister at Hammersmith. Mrs. Bowden died in 1820, since which time there had been no person living at Hammersmith answering the description in the codicil. It further appeared that the testatrix, who was of great age, had been intimately acquainted with the Bowdens and the Washbournes; that she had been in the habit of calling Mrs. Washbourne by her maiden name of Bowden; and that being often reminded of the mistake, she had always acknowledged that she had confounded the two names. Under these circumstances, Vice-Chancellor Wigram decided that the claimants were entitled to their respective legacies. So, where a bequest was made to "Mrs. G.," parol evidence was admitted to show that the testator had been in the habit of calling a Mrs. Gregg, Mrs. G. (*u*). The case of *Beaumont v. Fell* (*x*), carries this doctrine to

(*r*) *Doe v. Hiscocks*, 5 M. & W. 368, per Lord Abinger.

(*s*) 11 Sim. 467, 470; 1 Phill. 284, 285, S. C.

(*t*) 4 Hare, 251—253. See also *R. v. Wooldale*, 6 Q. B. 549.

(*u*) *Abbott v. Massie*, 3 Ves. 148, explained by Rolfe, B., in *Clayton v. Lord Nugent*, 13 M. & W. 204, 207.

(*x*) 2 P. Wms. 141. In this case declarations of the testator were admitted, but the propriety of receiving such evidence has been strongly questioned by Lord Abinger in *Doe v. Hiscocks*, 5 M. & W. 371, and the case, as an authority on that point, may be considered to be overruled.

its extreme limit. There, a legacy given to Catherine Earnley, was claimed by Gertrude Yardley; and it appearing that there was no such person as Catherine Earnley, proof was received that the testator usually called the claimant Gatty, which might easily have been mistaken by the scrivener who drew the will for Katy; and the Court, acting on this, and on other evidence of a like nature, was perhaps justified in deciding in favour of the claimant.

§ 860. The rule, which governs the admissibility of declarations of intention, will be better understood by referring to a few cases, where evidence of such declarations has been rejected; and we shall allude to these cases the more readily, because they will be found to illustrate a distinction, which has been recognised since the days of Lord Bacon, as subsisting between *latent* and *patent* ambiguities. The leading doctrine on this subject is thus given by that great philosophical lawyer: *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur* (y). Upon which he remarks that, "there be two sorts of ambiguities of words; the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it

(y) Bacon's Maxims, Reg. 23.

shall be holpen by averment, whether of them it was, that the party intended should pass" (z).

§ 861. We have cited the above quotation from Lord Bacon's works, more out of respect for that great man, than in the expectation that much practical information will be derived from it. Indeed, one object which we have in view is, to caution our readers against the supposition that, because no ambiguity arises on the face of the instrument, any doubt, which is occasioned by the introduction of extrinsic evidence, may be cleared up by having recourse to the declarations of the writer's intention. No doubt, where the ambiguity is patent, such declarations cannot be received; and, therefore, if a testator, after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will, so far as regarded the residuary bequest, would be inoperative and void. So, where Sir Gilbert East indulged the strange caprice of leaving his property to persons whom he designated by the letters of the alphabet, stating at the end of his will that the key to the initials was in his writing-desk on a card; the intended objects of his bounty were defeated by his next of kin, no card being found of as old a date as the will. A card, indeed, was discovered, which would have furnished a key, had it been admissible; but as it was dated many years after the execution of the will, it could only be regarded as a declaration of the testator; and, the case being one of patent ambiguity, the Court held that, in conformity with all the authorities on the subject, this species of evidence could not be legally admitted (a).

§ 862. But the cases go much further than this; for there are many instances of strictly *latent* ambiguities, where evidence of declarations of intention would be inadmissible. For, in the first place, a will, apparently plain and intelligible, may, when we come to make inquiry respecting the persons or things to which it relates, turn out to be uncertain; that is, the persons or things may prove not to have been described with *legal certainty*. Suppose a bequest be made to the *four* children of A., and it appears that

(z) See Bacon's Law Tracts, p. 99, 100.

(a) Clayton v. Lord Nugent, 13 M. & W. 200.

A. has *six* children, two by a first marriage, and the remainder by a second ; though evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to in the will, it seems that proof of the testator's declarations of intention could not be received (*b*).

§ 863. Secondly, a legatee may be so described in a will, that *while part of the description answers to one claimant, the remainder may apply to another*. The voice is Jacob's voice, but the hands are the hands of Esau. Here, if by looking at the surrounding facts, and placing itself, as near as may be, in the situation of the testator at the time of executing the instrument, the Court can *clearly* ascertain from the language of the will thus illustrated, which of the two claimants was intended by the testator, it will award the legacy to the one so meant to be benefitted (*c*); but, for this purpose, the Court cannot receive declarations of the testator of what he intended to do in making his will. This was the precise point determined in the leading case of *Doe v. Hiscocks* (*d*). There a testator devised lands to his son, John Hiscocks, for life ; and after his decease, to his grandson, "*John, the eldest son of the said John Hiscocks.*" In fact, the testator's son had been twice married ; by his first wife he had Simon, but John was the eldest son of the second marriage. Under these circumstances the Court held, that evidence of the instructions given by the testator for his will, and of his declarations, was inadmissible, for the purpose of showing which of these two grandsons was intended by the language employed.

§ 864. Thirdly, the description, though applicable in no respect to more than one person or thing shown to be in existence, may

(*b*) *Doe v. Hiscocks*, 5 M. & W. 371, per Lord Abinger, questioning *Hampshire v. Peirce*, 2 Ves. Sen. 216.

(*c*) *Doe v. Huthwaite*, 3 B. & A. 632, explained by Lord Abinger in *Doe v. Hiscocks*, 5 M. & W. 369, 372 ; *Blundell v. Gladstone*, 11 Sim. 467, 485—488 ; 1 Phill. 279, 282, 283, S.C.

(*d*) 5 M. & W. 363, 371, where Lord Abinger questions and overrules the contrary dicta of Lord Kenyon and Lawrence, J., in *Thomas v. Thomas*, 6 T. R. 677, 678.

not accurately specify even one person or thing; that is, the description of the subject intended may be true in part, but not true in every particular. Here, though parol evidence of the author's declarations cannot be received, the instrument will not, in consequence of the inaccuracy, be regarded as inoperative; but if, after rejecting so much of the description as is false, the *remainder* will enable the Court to *ascertain with legal certainty the subject-matter* to which the instrument really applies, it will be allowed to take effect. The rule in such cases is derived from the civil law;—*Falsa demonstratio non nocet, cum de corpore constat*. It is, however, essential, that enough remains to show plainly the intent. "The rule," said Mr. Justice Parke (e), "is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." It matters not which part of the description is placed first, and which last, in the sentence; since "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence" (f).

§ 865. Therefore, under a lease of "all that part of Blenheim park, situate in the county of Oxford, and now in the occupation of one S., lying" within certain specified abutments, "with all the houses thereto belonging, and which are now in the occupation of the said S.," it was held, that a house lying within the abutments, though not in the occupation of S., would pass (g). So, by a devise of "all that my farm called Trogue's farm, now in the occupation of C.," it was held, that the whole farm passed, though it was not all in C.'s occupation (h). So, also, a devise of all the testator's *freehold* houses in Aldersgate-street, when in fact he had only leasehold houses there,

(e) *Doe v. Galloway*, 5 B. & Ad. 43, 51.

(f) *Stukeley v. Butler*, Hob. 171.

(g) *Doe v. Galloway*, 5 B. & Ad. 43.

(h) *Goodtitle v. Southern*, 1 M. & Sel. 299, recognised as law in *Miller v. Travers*, 8 Bing. 263.

has been held in substance and effect to be a devise of his houses in that street, and the word freehold has been rejected as surplusage (i). So, if a landlord, having but one house in a street, were to describe it in a lease by a wrong number, and then let a tenant into possession under it, he could not afterwards rely on the error, and contend that no interest had passed; for the number would be rejected as an immaterial part of the description (k). And so, where land was described in a patent as lying in the county of M., and further described by reference to natural monuments; and it appeared that the land described by the monuments was in the county of H., and not of M.; that part of the description, which related to the county, was rejected. The entire description in the patent, said the Court, must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant description, which, by the other descriptions in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void (l). So, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands, which he owned, will be taken to be the true one, and the other rejected as falsa demonstratio (m).

(i) *Day v. Trig*, 1 P. Wms. 286, cited with approbation by Tindal, C. J., in *Miller v. Travers*, 8 Bing. 253; *Doe v. Cranstoun*, 7 M. & W. 1, 10, 11, per Parke, B.

(k) *Hutchins v. Scott*, 2 M. & W. 816, per Lord Abinger.

(l) *Boardman v. Reed and Ford's lessees*, 6 Peters, 328, 345, per McLean, J.

(m) *Loomis v. Jackson*, 19 Johns. 449; *Lush v. Druse*, 4 Wend. 313; *Jackson v. Marsh*, 6 Cowen, 281; *Worthington v. Hylyer*, 4 Mass. 196; *Blague v. Gold*, Cro. Car. 447; *Swyft v. Eyres*, id. 548. The object in cases of this kind is to interpret the instrument, that is, to ascertain the intent of the parties. The rule to find the intent is, to give most effect to those things about which men are least liable to mistake. *Davis v. Rainsford*, 17 Mass. 210; *McIver v. Walker*, 9 Cranch, 178. On this principle, the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled in America. *First*, The highest regard is had to natural boundaries. *Secondly*, To lines actually run, and corners actually marked, at the time of the grant. *Thirdly*, If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the

§ 866. In applying the above rule, we must bear in mind, that though false statements, which have been introduced into an instrument by way of affirmation only, may be rejected, provided the remaining description be sufficient to identify the person or thing intended, they cannot be disregarded, if they have been used by way of *exception* or *limitation*; because, in this latter case, it is obvious that they were intended to have a *material* operation (*n*). Moreover, we must not lose sight of another rule laid down by Lord Bacon, that if there be some subject-matter, wherein all the demonstrations in a written instrument are true, and some wherein part are true and part false, the words of such instrument shall be intended words of true limitation to pass only that subject-matter wherein all the circumstances are true (*o*). Thus, where a devise was of "all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk"; and it appeared that the testator had bought of the Duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name; the Court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land-tax upon all by one contract (*p*). So, where a testator devised to A. his *freehold* messuage, farm, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a

deed is thereby required; marked lines prevailing over those which are not marked. *Fourthly*, To courses and distances; giving preference to the one or the other, according to circumstances. See *Cherry v. Slade*, 3 Murphy, 82; *Dogan v. Seekright*, 4 Hen. & Munf. 125, 130; *Preston v. Bowmar*, 6 Wheat. 582; *Loring v. Norton*, 8 Greenl. 61; 2 Flintoff on Real Property, 537, 538. Words necessary to ascertain the premises must be retained; but words not necessary for that purpose may be rejected, if inconsistent with the others. *Worthington v. Hylyer*, 4 Mass. 205; *Jackson v. Sprague*, 1 Paine, 494; *Vose v. Handy*, 2 Greenl. 322. The expression of quantity is descriptive, and may well aid in finding the intent, where the boundaries are doubtful. *Mann v. Pearson*, 2 Johns. 37, 41; *Perkins v. Webster*, 2 N. Hamp. 287; *Thorndike v. Richards*, 1 Shepl. 437.

(*n*) *Taylor v. Parry*, 1 M. & Gr. 623, per Maule, J.

(*o*) *Doe v. Bower*, 3 B. & Ad. 459, 460, per Parke, J.

(*p*) *Id.* 453; *Pogson v. Thomas*, 6 Bing. N. C. 337.

peppercorn rent, the Court held that, as the devise correctly described the freehold, the leasehold part was not included therein, though it was proved that this part was interspersed with, and undistinguishable from, the freehold, and that the whole farm had always been treated as freehold by the testator (*q*). It seems that this last rule will be enforced with greater strictness, where an interpretation is to be put upon a devise of real estate, than in other cases; for it is an established doctrine of construction, that an heir-at-law shall not be disinherited except by express words (*r*).

§ 867. From the preceding cases and observations the following rules may be collected; first, that, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author (*s*). Secondly, if the description of the person or thing be *partly applicable* and *partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible (*t*). Thirdly, if the description be partly correct, and partly incorrect, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement (*u*). Fourthly, if the description be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe (*x*). Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of

(*q*) *Stone v. Greening*, 13 Sim. 390; *Hall v. Fisher*, 1 Coll. R. 47.

(*r*) *Doe v. Bower*, 3 B. & Ad. 459, per Parke, J.

(*s*) *Wigram on Wills*, 160.

(*t*) *Doe v. Hiscocks*, 5 M. & W. 363.

(*u*) *Wigram on Wills*, 54, 55.

(*x*) *Id.* 163.

the words, and one in which the author meant to use them, the instrument may have a full effect (*y*).

§ 868. It remains only to notice a class of cases, in which parol declarations of intention, in common with other extrinsic evidence, are allowed by Courts of Equity to affect the operation of a writing, though the writing, on its face, is free from ambiguity. The class alluded to embraces all those cases in which evidence is offered *to rebut an equity*. The meaning of this is, that, where Courts of Equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations, or of collateral facts, showing the intention to be otherwise (*z*). The simplest instance of this occurs, when two legacies, left to the same person by different testamentary instruments, are, contrary to the general rule, presumed not to have been intended as cumulative, on the ground that the sums and the expressed motives of both exactly correspond. Here, to rebut the presumption, which makes one of these legacies inoperative, parol evidence of every kind will be received; its effect being, not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed (*a*). In like manner, extrinsic evidence is admissible to repel the presumption against double portions, which Courts of Equity raise, when a father makes a provision for a child by settlement on her marriage, and afterwards provides for the same child by his will (*b*). So, also, to repel the presumption, that the portionment of a legatee by a parent or person in loco parentis, was intended to operate as an ademption, though only pro tanto (*c*), of the legacy (*d*). Another

(*y*) *Doe v. Hiscocks*, 5 M. & W. 369, 370, per Lord Abinger; *Wigram on Wills*, 12, cited ante, § 812, n. (*h*).

(*z*) *Hall v. Hill*, 1 Dru. & War. 113, 114, per Sugden, C.; *Hurst v. Beach*, 5 Madd. 351; *Trimmer v. Bayne*, 7 Ves. 518, per Lord Eldon.

(*a*) *Hurst v. Beach*, 5 Madd. 351, 359, 360, per Sir John Leach, V.-C.; recognised in *Hall v. Hill*, 1 Dru. & War. 116, 127, by Sugden, C.

(*b*) *Weall v. Rice*, 2 Russ. & Myl. 251, 267; *E. of Glengall v. Bernard*, 1 Keen, 769, 793; *Hall v. Hill*, 1 Dru. & War. 128—131, per Sugden, C., explaining and limiting the two former cases.

(*c*) *Pym v. Lockyer*, 5 Myl. & Cr. 29, per Lord Cottenham; recognised in *Suisse v. Lowther*, 2 Hare, 434, per Wigram, V.-C.

(*d*) *Trimmer v. Bayne*, 7 Ves. 518, per Lord Eldon; *Hall v. Hill*, 1 Dru. & War. 120; *Kirk v. Eddowes*, 3 Hare, 517, per Wigram, V.-C.

illustration is furnished by the doctrine of resulting trusts, where a man purchases a property in the name of a stranger. Here, as before observed (e), the law raises a presumption in favour of the person who paid the purchase money; but still, the stranger may give parol evidence to support his title, and show that the purchase was intended for his benefit, that is, he may rebut the presumption, and support the instrument (f). So, the presumption of the revocation of a will, which, before the new Will Act (g), arose from marriage and the birth of a son, might have been rebutted by parol evidence, showing that the testator did not intend to revoke the instrument (h).

§ 869. In all these cases, where parol evidence has been *first* admitted to show that the presumption drawn by the law is not in accordance with the real intention of the author of the instrument, counter evidence will likewise be received to *fortify* the presumption; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill-founded (i). But here, it must be carefully noted, that, in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced; for, in the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument (k). If, then, the circumstances, on the face of the instrument, are such as to rebut the presumption drawn by the law, or if the Court does not raise any presumption at all, parol evidence to fortify the presumption in

(e) *Ante*, § 737.

(f) *Hall v. Hill*, 1 Dru. & War. 114, per Sugden, C. See also *Sidmouth v. Sidmouth*, 2 Beav. 447.

(g) 7 Will. 4 & 1 Vict., c. 26, §§ 18, 19.

(h) *Hall v. Hill*, 1 Dru. & War. 114, 115. So, before the act of 11 Geo. 4 & 1 Will. 4, c. 40, which made executors trustees of the undisposed of residue for the persons entitled thereto under the Statute of Distributions, the presumption against an executor's title to the residue, from the fact that a legacy had been given to him, was liable to be rebutted by parol evidence. *Id.*; *Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 115, 116.

(i) *Kirk v. Eddowes*, 3 Hare, 517, 520; *Hall v. Hill*, 1 Dru. & War. 121.

(k) *Id.*

the one case, or to create it in the other, will be alike inadmissible; because, in either event, the effect of the evidence would be to contradict the apparent meaning of the writing. The important case of *Hall v. Hill* (l) affords a good illustration of this distinction. There a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of 800*l.*, part to be paid during his life, and the residue at his decease. He subsequently, by his will, bequeathed to his daughter a legacy of 800*l.*; and the question was, whether this legacy could be considered as a satisfaction of the debt. Parol evidence of the testator's declarations was tendered to show that such was his real intention, and Lord Chancellor Sugden acknowledged that the evidence, if admissible, was conclusive on the subject (m). His Lordship, however, finally decided, that though the debt was to be regarded in the light of a portion (n), yet, as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or, rather, it could not, under the circumstances, be raised by the Court; and the consequence was, that the declarations were rejected. Indeed, the evidence would have been equally inadmissible in the first instance, on the ground of its inutility, had the ordinary presumption arisen; though, in such case, had the opponent offered parol evidence to show that the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law.

§ 870. With the view of clearly understanding the subject under discussion, it is essential to distinguish between mere *legal presumptions*, and *rules of construction*; because, while the former may be rebutted, and if rebutted, supported also, by parol testimony,

(l) 1 Dru. & War. 94. This case deserves an attentive perusal, the judgment of Sugden, C., containing an elaborate discussion of all the important authorities on the subject. The cases of *Wallace v. Pomfret*, 11 Ves. 542; *Coote v. Boyd*, 2 Bro. C. C. 521; *Weall v. Rice*, 2 Russ. & Myl. 251, 263; *Booker v. Allen*, 2 Russ. & Myl. 270; and *Lloyd v. Harvey*, id. 310, are much shaken, if not overruled by this decision.

(m) 1 Dru. & War. 112.

(n) Id. 108, 109.

no evidence can be received on either side, if the Court *by construction* can arrive at a conclusion respecting the meaning of the instrument (*o*). Yet, important as it is to mark this distinction, it is by no means easy on all occasions to do so; and the difficulty is increased by the loose manner in which the word "presumption" has occasionally been used. Thus, instead of confining it to its strict sense, as meaning an inference raised by the Courts independently of, or against, the words of an instrument, it is often employed as denoting an inference in favour of a given construction of particular language (*p*). For instance, in *Coote v. Boyd* (*q*), Lord Thurlow says, "where the *presumption* arises from the construction of words, simply quâ words, no evidence can be admitted;" evidently using the word presumption as tantamount to a rule of law. Among the rules of construction, which have occasionally been mistaken for legal presumptions, may be mentioned the one now clearly established, which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the Court to presume that repetition, and not accumulation, was intended (*r*). Extrinsic evidence cannot be received to impugn this rule; for to admit it would be to construe a writing by parol evidence (*s*).

(*o*) *Lee v. Pain*, 4 Hare, 216, per Wigram, V.-C.; *Hall v. Hill*, 1 Dra. & War. 116, 122, 126, 132, 133, per Sugden, C.

(*p*) *Lee v. Pain*, 4 Hare, 216, 217, per Wigram, V.-C.

(*q*) 2 Bro. C. C. 527.

(*r*) *Hurst v. Beach*, 5 Madd. 358; *Suisse v. Lowther*, 2 Hare, 424, 432, 433; *Lee v. Pain*, 4 Hare, 218—219; *Kirk v. Eddowes*, 3 Hare, 516. (*s*) *Id.*

PART III.

OF THE INSTRUMENTS OF EVIDENCE.

CHAPTER I.

OF WITNESSES, AND THE MEANS OF PROCURING THEIR
ATTENDANCE.

§ 871. HAVING thus discussed the general Nature and Principles of Evidence, and the Rules which govern its production, we come, in the third place, to speak of the Instruments of Evidence, or the means by which the truth in fact is established. In treating this subject we shall consider how such Instruments are obtained, and used, and their admissibility, and effect. Now, the Instruments of Evidence are divided into two general classes, namely, *unwritten*, and *written*. The former will naturally first arrest our attention, because, in proceeding by documentary evidence, it is often necessary first to establish by oral testimony the genuineness of the documents to be adduced.

§ 872. By *Unwritten*, or *Oral Evidence*, is meant the testimony given by witnesses, *vivâ voce*, either in open court, or before a magistrate or other officer, acting by virtue of a commission or other legal authority. Under this head it is proposed briefly to consider, (1.) The methods, in general, of procuring the attendance and testimony of witnesses;—(2.) The competency of witnesses;—(3.) The practice which obtains in the examination of witnesses; and herein, of the impeachment and the corroboration of their testimony.

§ 873. In *criminal cases*, the ordinary and most effectual method of enforcing the attendance of witnesses for the Crown is by *recognizance*, which is a bond of record, testifying that the recognizor owes the Queen a certain sum, to be levied on his goods and

tenements for the use of her Majesty, if he fail to appear and give evidence at the time and place specified in the condition. By statute 7 Geo. 4, c. 64, the justice, before whom the preliminary investigation is heard, is authorised in all cases, whether of felony or misdemeanor, to bind by recognizance all such persons as know or declare anything material touching the charge, to appear and give evidence at the trial against the party accused (*a*); and the same act gives similar power to all coroners, taking an inquisition, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact (*b*).

§ 874. These provisions, which apply to justices and coroners not only of counties, but of all other jurisdictions (*c*), are obviously of great use in promoting the due administration of justice; but, in order to avoid any hardship which, in the event of non-attendance, witnesses might incur from indiscriminately estreating their recognizances, it is enacted, that the officer of the court, by whom the estreats are made out, shall prepare a written list of defaulters, specifying the name, residence, and trade or profession of each, the nature of the offence respecting which he was to testify, the cause, if known, of his absence, and whether by reason of his non-attendance the ends of justice have been defeated or delayed: this list must be laid before the judge at the assizes, or before the recorder or other corporate officer, or the chairman or two other justices of the peace at the sessions, who are respectively required to examine it, and to make such order touching the estreating of the recognizances as they shall consider just; but no recognizance can be estreated or put in process, without the written order of the presiding judge or other persons, before whom the list has been laid (*d*). If the witness, after having been examined on oath before the magistrate or coroner, shall refuse to be bound over, he may be committed (*e*); and where a married woman, who could not enter into her own recognizance, refused either to appear at the sessions or to find sureties for her appearance, the Court held

(*a*) §§ 2 and 3. See corresponding Irish Act, 9 Geo. 4, c. 54, §§ 2 and 3.

(*b*) § 4; 9 Geo. 4, c. 54, § 4, Ir.

(*c*) § 6; 9 Geo. 4, c. 54, § 6, Ir.

(*d*) 7 Geo. 4, c. 64, § 31; 9 Geo. 4, c. 54, § 34, Ir.

(*e*) 2 Hale, P.C. 282; *Bennet v. Watson*, 3 M. & Sel. 1; 9 Geo. 4, c. 54, § 2, Ir. See *Ashton's case*, 7 Q.B. 169.

that the justice was fully warranted in committing her, in order that she might be forthcoming as a witness at the trial (*f*). It seems that a recognizance to prosecute or give evidence is binding on an infant; at least, it has been held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes to prosecute for felony (*g*); but the better opinion is, that a justice is not authorised to commit any witness for refusing to find sureties to be bound with him, provided he be willing to enter into his own recognizance (*h*).

§ 875. This mode of enforcing the attendance of witnesses is not confined to proceedings by indictment, but may be adopted in several cases, where an appeal is to the sessions from the conviction of one or more justices. Thus, for example, the Act of 9 Geo. 4, c. 61, which was passed to regulate alehouses, after enacting, in the 27th section, that any person, who shall think himself aggrieved by any act of any justice done in execution of that act, may appeal to the sessions, provided such person shall give due notice to the justice of his intention so to do, and shall enter into his recognizance with two sufficient sureties to appear at the sessions, try the appeal, abide by the judgment of the Court, and pay the costs awarded;—provides that, in such case, the justice, before whom the recognizance shall have been entered into, may summon any person, whose evidence shall appear to him to be material, and require him to be bound in recognizance to appear at the sessions, and to give evidence in such appeal; and in case such person shall neglect or refuse to obey the summons, or shall refuse to enter into the recognizance, the justice may issue his warrant to apprehend him, and to bring him before such justice, and if such person shall continue to refuse to enter into such recognizance, he may commit him to the common gaol or house of correction of the county or place for which such justice shall be then acting, there to remain until he shall enter into such recognizance, or shall be otherwise discharged by due course of law. So if any person, convicted of a third offence against the Act passed

(*f*) *Bennet v. Watson*, 3 M. & Sel. 1.

(*g*) *Ex parte Williams*, 13 Price, 670; M'Clel. 493, S. C.

(*h*) *Per Graham, B.*, as cited 2 Ch. Burn's, J., 122; *per Lord Denman in Evans v. Rees*, 12 A. & E. 59.

to permit the retail of beer and cyder (*i*), shall appeal to the sessions, and enter into the recognizance mentioned in the Act, the justices, who shall take such recognizance, are *required* to bind the person who shall make the charge in a recognizance to appear at the sessions, to give evidence against the person so charged; “and, in like manner, to bind any other person who shall have any knowledge of the circumstances of such offence” (*k*). Again, the statute for the punishment of rogues and vagabonds (*l*) enacts, in the 9th section, that when any justice shall commit any incorrigible rogue to the house of correction, there to remain till the next sessions, or when any idle or disorderly person, rogue and vagabond, or incorrigible rogue, shall give notice of his intention to appeal, and shall enter into recognizances to prosecute such appeal, such justice shall require the person by whom such offender shall be apprehended, and the person or persons whose evidence shall appear to him to be material to prove the offence, and to support such conviction, to become bound in recognizance to appear at the sessions, to give evidence against such offender; and the justices at sessions are authorised and empowered to order the treasurer of the county, &c., to pay such sum to the prosecutor and witnesses, as will re-imburse them for their expenses and trouble and loss of time; and in case any such person shall refuse to enter into such recognizance, the justice may commit him to the common gaol, there to remain until he shall enter into the recognizance, or be otherwise discharged by due course of law.

§ 876. Similar clauses, varied, as to their language, according to the taste or practical knowledge of the draughtsman, are scattered through the volumes of the statutes (*m*); though in numerous instances, as in the larceny Act (*n*), the Act relating to malicious injuries to property (*o*), the Game Acts (*p*), the Act

(*i*) 11 Geo. 4 & 1 Will. 4, c. 64.

(*k*) § 16. See also, 4 & 5 Will. 4, c. 85, § 11; and 3 & 4 Vict. c. 61, § 21.

(*l*) 5 Geo. 4, c. 83.

(*m*) See the Act for regulating the slaughter of horses, 7 & 8 Vict. c. 87, § 9.

(*n*) 7 & 8 Geo. 4, c. 29, § 72.

(*o*) 7 & 8 Geo. 4, c. 30, § 38.

(*p*) 52 Geo. 3, c. 93, sched. (L), § 13; 1 & 2 Will. 4, c. 32, § 44; 9 Geo. 4, c. 69, § 6.

regulating mines and collieries (*g*), the Act to prevent frauds of manufacturers (*r*), and in many more that might be cited, the power of binding witnesses by recognizance is omitted in the clauses giving an appeal to the sessions; and in some statutes, as in those which relate to joint-stock companies (*s*), to buildings in the metropolis (*t*), and to the embezzlement of public stores (*u*), the justices in sessions, to whom the appeal lies, are expressly empowered to call witnesses before them by summons or precept.

§ 877. A *second mode* (*x*) of procuring the attendance of witnesses, which may be adopted in criminal cases, and constitutes the ordinary summons in civil proceedings, is by serving the witness with a writ of *subpœna ad testificandum*, which is a judicial writ, directed to the witness, commanding him in the Queen's name to appear at the Court, and to testify what he knows in the cause therein described, pending in such Court, under a certain penalty mentioned in the writ. If the witness is required to produce any books or papers in his possession, a clause to that effect is inserted in the writ, which is then termed a *subpœna duces tecum* (*y*).

§ 878. This writ, equally with the common subpœna, is compulsory upon the witness, who must attend with the documents demanded therein, if he has them in his possession, and leave the question of their actual production to the judge, who will decide upon the validity of any excuse that may be offered for withholding

(*g*) 5 & 6 Vict. c. 99, § 21.

(*r*) 6 & 7 Vict. c. 40, § 29.

(*s*) 7 & 8 Vict. c. 110, § 74.

(*t*) 7 & 8 Vict. c. 84, § 53.

(*u*) 39 & 40 Geo. 3, c. 89, § 21.

(*x*) The substance of the following 17 pages has already appeared in the Law Rev., No. 2, p. 284—297.

(*y*) This additional clause is to the following effect :—“and also, that you do diligently and carefully search for, examine, and inquire after, and bring with you and produce at the time and place aforesaid, a bill of exchange, dated” &c. (here describing with precision the papers and documents to be produced,) “together with all copies, drafts, and vouchers relating to the said documents, and all other documents, letters, and paper writings whatsoever, that can or may afford any information or evidence in the said cause; then and there to testify and show all and singular those things, which you (or either of you) know, or the said documents, letters, or instruments in writing do import, of and concerning the said cause now depending. And this you (or any of you) shall in no wise omit,” &c. 3 Chitty's Gen. Prac. 830, n.; *Amey v. Long*, 9 East, 473.

them (*z*). Thus, an attachment will lie against an overseer or solicitor of a parish, who, in an inquiry touching the settlement of a pauper, refuses to bring the rate-books of such parish to the petty sessions, in obedience to a Crown Office subpœna; though it may be very questionable whether he would be bound to submit these books to examination, in the event of his bringing them into court (*a*). So, the fact that the legal custody of the instrument belongs to another person will not authorise a witness to disobey the subpœna, provided the instrument be in his actual possession (*b*); but documents filed in a public office are not so in the possession of the clerk, as to render it necessary, or even allowable, for him to bring them into court, without the permission of the head of the office (*c*).

§ 879. Writs of subpœna suffice for only one sitting or term of the Court; and, therefore, if the cause is made a remanet, or is postponed by adjournment to another term or session, the writ must be resealed, and the witness summoned anew (*d*). But a subpœna, requiring the party to attend a trial on the commission day, extends to the whole assizes, which, by a curious fiction of law, are supposed to last but one day (*e*). Again, if any alteration be made in the writ, after it is sued out, though before it is served, it must be resealed; and, therefore, when the day of appearance named in a subpœna was altered by an attorney from one term to another, it was held that the writ thereby became void, and that the witness, on whom it was served subsequently to the alteration having been made, might consequently treat it as waste paper (*f*). The writ, also, must be issued while the Court is sitting; for, if it bears teste out of term, it is void (*g*). The time is surely come when this unreasonable and inconvenient rule should be abolished.

(*z*) *Amey v. Long*, 9 East, 473; 6 Esp. 116; 1 Camp. 14, S. C. See ante, § 21; and as to what is a valid excuse, see ante, §§ 338, 339.

(*a*) *R. v. Greenaway*, and *R. v. Carey*, 7 Q. B. 126.

(*b*) *Amey v. Long*, 1 Camp. 14, per Lord Ellenborough.

(*c*) *Thornhill v. Thornhill*, 2 Jac. & W. 347; *Austin v. Evans*, 2 M. & Gr. 430.

(*d*) *Sydenham v. Rand*, 3 Doug. 429; S. C. cited 2 Tidd, 855, 8th Ed.

(*e*) *Scholes v. Hilton*, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.; *Swanne v. Taaffe*, 8 Ir. Law R. 101.

(*f*) *Barber v. Wood*, 2 M. & Rob. 172, per Lord Abinger.

(*g*) *Edgell v. Curling*, 2 Dowl. & L. 600; 7 M. & Gr. 958, S. C.

§ 880. The service of a subpœna upon a witness ought always to be made a *reasonable time* before trial, to enable him to put his affairs in such order, that his attendance on the Court may be as little detrimental as possible to his interest (*h*). On this principle, a summons in the morning to attend in the afternoon of the same day, has more than once been held insufficient, though the witness lived in the same town, and very near to the place of trial (*i*). Where, however, a witness was served at twelve o'clock, while standing on the steps of the court-house, and, being then told that the cause was coming on that day, replied, "very well," the Court held that his non-attendance at five o'clock, when the trial was heard, rendered him liable to an action, since his answer was equivalent to an admission that the service was in time (*k*). So, if a witness be in court as a spectator, he cannot, it seems, object to give evidence, on the ground that the subpœna has only just been served upon him (*l*); though, if he be an attorney, who is engaged in winding up another cause, the rule may be different; or at least it is highly probable that he would not be liable to an attachment for disobedience (*m*). Neither in criminal prosecutions can a witness decline to be sworn, though he has not been subpœnaed at all (*n*). But, in civil cases a witness may always refuse to be examined, unless he be properly served with a writ (*o*). Where a subpœna, requiring the attendance of a witness on the 31st of March, and so on from day to day until the issue should be tried, was served on the 2nd of April, when the witness was distinctly told that the trial had not come on, he was held civilly responsible for disobeying the writ on the 6th of April when the

(*h*) *Hammond v. Stewart*, 1 Str. 510.

(*i*) *Id*; *Barber v. Wood*, 2 M. & Rob. 172, per Lord Abinger.

(*k*) *Maunsell v. Ainsworth*, 8 Dowl. 869, per Parke and Alderson, Ba.; *Jackson v. Seager*, 2 Dowl. & L. 13, per Wightman, J.

(*l*) *Doe v. Andrews*, 2 Cowp. 845.

(*m*) *Pitcher v. King*, 2 Dowl. & L. 755, per Williams, J.

(*n*) *R. v. Sadler*, 4 C. & P. 218, per Littledale, J.

(*o*) *Bowles v. Johnson*, 1 W. Bl. 36. See *contra*, *Blackburn v. Hargreave*, 2 Lew. C. C. 259, where Hullock, B., is reported to have held, that, if a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered. *Sed qu.* A witness is not bound to obey a subpœna in a civil cause, unless his expenses be tendered, although the party, who requires his testimony, is suing in formâ pauperis. 2 Lew. C. C. 259, per Hullock, B.

cause was heard (*p*); though had he received no notice at the time of service that the cause had not then been tried, the result might have been different, and he would at least have avoided the penalty of an attachment (*q*). As the question whether the writ has been served within a reasonable time is in the discretion of the judge (*r*), and must vary according to the circumstances of each case, it is hoped that the decisions cited above will be sufficient to illustrate the general practice (*s*); but we may notice, that, in the United States, the reasonableness of the time is generally fixed by statute, one day being usually allowed for every twenty miles that intervene between the residence of the witness and the place of trial. Perhaps a somewhat similar rule might, with advantage, be adopted in this country.

§ 881. As to the *manner of service*, it is not usual to part with the original writ, which may include the names of four witnesses (*t*); but the practice is, to make out for each witness a subpoena-ticket, which is a copy of the writ, or, at least, a statement of its substance, duly certified (*u*), and then to serve the witness *personally* with this ticket, *at the same time showing him the original writ*. It seems that the necessity of personal service will not be dispensed with, even though it be sworn that the witness keeps out of the way to avoid such service (*x*); and the provision, which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot be chargeable with a contempt in not appearing upon the summons (*y*).

§ 882. If the subpoena-ticket vary in any material degree from the original writ, as where the ticket required the witness to

(*p*) *Davis v. Lovell*, 7 Dowl. 178.

(*q*) *Id.* 183; *Alexander v. Dixon*, 1 Bing. 366; 8 Moore, 387, S. C.

(*r*) *Barber v. Wood*, 2 M. & Rob. 172; ante, § 21.

(*s*) See further the analogous cases, respecting the reasonable service of a notice to produce, ante, § 329. (*t*) See *Doe v. Andrews*, 2 Cowp. 846.

(*u*) *Maddison v. Shore*, 5 Mod. 355; Cro. Car. 540.

(*x*) See *In re Pyne*, 1 Dowl. & L. 703.

(*y*) *Wadsworth v. Marshall*, 1 Cr. & M. 87; *R. v. Wood*, 1 Dowl. 509, per Littledale, J.; *Garden v. Cresswell*, 2 M. & W. 319; 5 Dowl. 461, S. C.; *Jacob v. Hungate*, 3 Dowl. 466; *Pitcher v. King*, 2 Dowl. & L. 755, per Williams, J.

attend on the 24th of May, and the writ itself specified the 27th, an attachment for disobedience cannot be obtained (*z*). So the writ must state, with reasonable certainty, the name of the cause, as also the place in which the attendance of the witness is required. Thus, in a subpoena to attend an action of ejectment, the names of the lessors of the plaintiff must be introduced (*a*); and if it be a town cause, the writ must specify whether it will be tried at Westminster or at Guildhall (*b*). Where, however, the subpoena required the attendance of the witness at Westminster Hall, the *Nisi Prius* sittings being in fact held at the adjoining sessions-house, it was held that an attachment might be granted for non-attendance at the sessions-house, notices being affixed to the wall of the Court in Westminster Hall, directing witnesses to proceed to that place (*c*). So, where a subpoena, tested the 9th of May and served on the 19th, required attendance on the 21st of March instant, the Court considered that this was an error which could not mislead (*d*).

§ 883. In order the more effectually to secure the attendance of witnesses in civil cases, the Act of 5 Eliz. c. 9, § 12, enacts, that, if any person upon whom any process of subpoena out of a Court of Record shall be served, “and having tendered to him, according to his countenance or calling, such reasonable sum for his costs and charges, as, having regard to the distance of the places, is necessary to be allowed,” shall, without lawful cause, neglect to appear, he shall *forfeit* 10*l.*, and yield such further recompence to the party aggrieved, as the judge in his discretion shall award. Under this statute, the *reasonable expenses* of the witness for going to, returning from, and staying at, the place of trial, should be tendered to him at the time of serving the subpoena (*e*), or, at least, a reasonable time before the trial (*f*); and even though he actually appear,

(*z*) *Doe v. Thomson*, 9 Dowl. 948, per Wightman, J.

(*a*) *Id.* In Ireland it is sufficient if the subpoena be entitled in the name of one of the lessors of the plaintiff, *Swanne v. Taaffe*, 8 Ir. Law R. 101.

(*b*) *Milson v. Day*, 3 M. & P. 333.

(*c*) *Chapman v. Davis*, 1 Dowl. N.S. 239; 4 Scott, N.R. 319; 3 M. & Gr. 609, S. C.

(*d*) *Page v. Carew*, 1 Cr. & J. 514.

(*e*) *Fuller v. Prentice*, 1 H. Bl. 49.

(*f*) *Horne v. Smith*, 6 Taunt. 9; 1 Marsh. 410, S. C.; 13 East, 16, n. (*a*).

he cannot be attached for refusing to give evidence, unless these charges are paid or tendered (*g*). Where the witness lives, and is summoned to testify, within the bills of mortality, it is usual to leave a shilling with him, upon the delivery of the subpoena-ticket, though this may now be considered an unnecessary form (*h*). In other cases the sum tendered should be proportioned to the situation and circumstances of the witness (*i*); but the party summoning must bear in mind, that, in proceeding against a witness for contempt, the Court will not balance too nicely the expenses of travelling (*k*); while the party summoned must remember, that, except in the case of a witness called to give his *opinion* in a matter, with which, from his business, he is peculiarly conversant (*l*), no compensation for *mere loss of time* can be legally demanded (*m*).

§ 884. Such compensation was, indeed, formerly allowed to medical men and attornies; but the distinction in their favour, being deemed invidious, has now been overruled (*n*). Still, a reasonable compensation, paid to a foreign witness who refuses to come without it, and whose attendance is essential in the cause, will in general be allowed and taxed against the losing party (*o*); and where the captain of a ship has been detained for a long time in this country in order to give evidence on a trial, large sums, calculated at a guinea a day, and amounting in the whole to above 100*l.*, have been allowed for his detention (*p*). So, an officer of

(*g*) *Bowles v. Johnson*, 1 W. Bl. 36; *Newton v. Harland*, 1 M. & Gr. 956; 9 Dowl. 16, S. C.

(*h*) *Jacob v. Hungate*, 3 Dowl. 456.

(*i*) *Dixon v. Lee*, 1 C. M. & R. 645; *Vice v. Lady Anson*, M. & M. 96.

(*k*) *Chapman v. Paynton*, 13 East, 16 n. (*a*), per Wright, J.

(*l*) *Webb v. Page*, 1 C. & Kir. 23, per Maule, J.

(*m*) *Moor v. Adam*, 5 M. & Sel. 156; *Willis v. Peckham*, 3 B. & B. 72; *Collins v. Godefroy*, 1 B. & Ad. 950.

(*n*) *Collins v. Godefroy*, 1 B. & Ad. 950; *Lonergan v. Roy. Ex. Co.*, 7 Bing. 731, 732.

(*o*) *Lonergan v. Roy. Ex. Co.*, 7 Bing. 725; *id.* 729, S. C.; *Tremain v. Barrett*, 6 Taunt. 88; 1 Marsh. 463, S. C.

(*p*) *Stewart v. Steele*, 4 M. & Gr. 669; *Mount v. Larkins*, 8 Bing. 195; 1 M. & Sc. 357; 1 Dowl. 262, S. C.; *Temperley v. Scott*, 8 Bing. 392; 1 M. & Sc. 601, S. C.; *Evans v. Watson*, 3 Com. B. 327; *Berry v. Pratt*, 1 B. & C. 276.

the Court of Chancery, who, either in person or by deputy, attends a trial with original records of the Court, is entitled to a reasonable fee for such attendance; because, in this case, the subpoena is not alone sufficient to compel him to produce the records, and the party, therefore, who seeks their production, will be supposed to be willing to pay the usual additional charge (*q*). The Act, too, of 3 & 4 Vict. c. 92, which was passed to render certain non-parochial registers and records admissible as evidence of births, baptisms, deaths, burials, and marriages, after enacting in § 6, that the registrar-general, in whose custody they are, shall produce them or cause them to be produced on subpoena or order of any competent tribunal, goes on to provide, that this shall be "on payment of a reasonable sum, to be taxed as the Court shall direct, and to be paid to the registrar-general, on account of the *loss of time* of the officer by whom such register or record shall be produced, and to enable the registrar-general to defray the travelling and other expenses of such officer."

§ 885. If the witness be a married woman, the money should, it seems, be tendered to her, rather than to the husband (*r*); and if a person be subpoenaed by both parties, he is entitled, before giving evidence, to be paid by the party actually calling him all the expenses to which he will be liable, after exhausting what he may have received from the opposite side (*s*). Of course the witness may waive his right to demand the payment of his expenses, and if he does so, either directly, by agreeing to take a less sum than that to which he is entitled (*t*), or indirectly, by accompanying the parties to the place of trial without previously making any claim (*u*), he will be liable to all the consequences of disobedience, should he

(*q*) *Bentall v. Sydney*, 10 A. & E. 162; 2 P. & D. 416, S. C.; *Bastard v. Smith*, 10 A. & E. 213; 2 P. & D. 453, S. C.

(*r*) *Cro. El.* 122; *W. Jon.* 430.

(*s*) *Allen v. Yoxall*, 1 C. & Kir. 315, per Rolfe, B.; *Betteley v. M'Leod*, 3 Bing. N. C. 405, 407; 5 Dowl. 481, S. C.

(*t*) *Betteley v. M'Leod*, 3 Bing. N. C. 405.

(*u*) *Newton v. Harland*, 1 M. & Gr. 956. There the witness having accompanied the plaintiffs to the place of trial, and lived with them there, was deemed to have waived her right to remuneration up to the time of the trial, though she was held to be still entitled to claim her fair expenses for returning home.

subsequently refuse to appear as a witness (*x*). Still the Court will not grant an attachment against him, simply because he has made an unreasonable demand, unless a fair sum has been actually tendered to him (*y*). In America, the expenses of witnesses are settled by statute, at a fixed sum for each day's actual attendance, and for each mile's travel from the residence of the witness to the place of trial (*z*); but, in this country, the question as to what constitutes reasonable remuneration is left very much in the discretion of the taxing officers, or is decided by reference to the scale of fees, which may chance to have been adopted in the particular Court.

§ 886. In *criminal cases*, *no tender of fees* is in general necessary, either on the part of the Crown or of the prisoner, in order to compel the attendance of the respective witnesses (*a*); and this rule will prevail, though the indictment has been removed by certiorari, and is consequently tried in the Nisi Prius Court (*b*). An exception, however, has been recognised by the legislature in favour of those witnesses, who, living in one distinct part of the United Kingdom, are required to obey subpoenas directing their attendance in another; and who are not liable to punishment for disobedience of the process, unless, at the time of service, a reasonable and sufficient sum of money to defray their expenses in coming, attending, and returning, has been tendered to them (*c*).

§ 887. Although witnesses in Crown cases cannot, except under the circumstances just stated, claim, as a matter of right, the payment of their expenses, it being considered by the law to be the public duty of every citizen to obey a call of this description,—yet, in order to encourage the due prosecution of offenders, the legislature has authorised courts to grant to prosecutors and

(*x*) *Goodwin v. West*, Cro. Car. 522, 540.

(*y*) *Newton v. Harland*, 1 M. & Gr. 956.

(*z*) See Conklin's Pr. 265, 266; LL., U. S. 1799, Ch. 125, § 6, vol. i. p. 571, Story's Ed.; 1 Paine & Duer's Pr. 497.

(*a*) Per Bayley, J., cited 2 Russ. C. & M. 948, n. (*a*); *R. v. Cousens*, id. per Wightman, J.; *R. v. Cooke*, 1 C. & P. 322, per Park, J., and Garrow, B.

(*b*) *R. v. Cooke*, 1 C. & P. 322.

(*c*) 45 Geo. 3, c. 92, § 4.

witnesses such costs as will reimburse them for the expenses they have incurred, in all cases of felony (*d*), and in most serious charges

(*d*) 7 Geo. 4, c. 64, § 22, enacts, that "the Court¹ before which any person shall be prosecuted or tried for any felony is hereby authorised and empowered, at the request of the prosecutor or of any other person, who shall appear on recognizance² or subpoena to prosecute or give evidence against any person accused of *any felony*, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution³; and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred⁴, it shall still be lawful for the Court, where any person shall, in the opinion of the Court, *bonâ fide* have attended the court in obedience to any such recognizance or subpoena, to order payment unto such person of such sum of money as to the Court shall seem reasonable and sufficient, to reimburse such person for the expenses which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpoena;

¹ This Act does not apply to cases where the indictment has been removed into the Court of Queen's Bench by certiorari. *R. v. Kelsey*, 1 Dowl. 481; *R. v. Richards*, 8 B. & C. 420, by the twelve judges; *R. v. Johnson*, 1 Moo. C. C. 173; *R. v. Jeyes*, 3 A. & E. 419, per Littledale, J. There seems to be no distinction as to this, between a removal by the prosecutor and a removal by the defendant. *R. v. Treasurer of Exeter*, 5 M. & R. 167, per Littledale, J. Sed qu.; and see 8 A. & E. 590.

² A party will be entitled to his expenses under this sect., though he has been bound over to prosecute by the Quarter Sessions, *R. v. Paine*, 7 C. & P. 136.

³ Under these words, all extra expenses incurred in getting up a prosecution may be reimbursed, *except* the attendance of witnesses before the coroner. *R. v. Lewen*, 2 Lew. C. C. 161, per Lord Denman; *R. v. Rees*, 5 C. & P. 302, per Littledale, J.; *R. v. Taylor*, id. 301, per id. Extra expenses incurred by a witness in consequence of being taken ill during his attendance at the trial have also been allowed. *Re Mallison*, 1 Lew. C. C. 132, per Patteson, J.; *Anon.*, id. 133, per Parke, J.

⁴ Expenses have been allowed to the prosecutor and witnesses, though the prisoner did not reach the assize town till the grand jury had been discharged, *Anon.*, 1 Lew. C. C. 128, per Hullock, B.; though the accused, who had not been apprehended, and was under no recognizance, did not appear to take his trial, *Flannery's case*, 1 Lew. C. C. 133, per Alderson, B.; *Anon.*, id. 134, per Gurney, B.; though the prisoner had been apprehended under a bench-warrant, and the prosecutor and witnesses were under no recognizances, and only one of them had been subpoenaed, *R. v. Butterwick*, 2 M. & Rob. 196, per Parke, B.; and though the accused was not forthcoming, having been, through some mistake, discharged by proclamation at a preceding sessions, but the witnesses being bound over to appear, and a true bill having been actually found, *R. v. Robey*, 5 C. & P. 552, per Taunton, J.

of misdemeanor (e); and, moreover, in some grave cases of felony, courts of oyer and terminer and gaol delivery are empowered to order additional remuneration to be paid to any persons, who have

and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned." See 6 & 7 Will. 4, c. 116, § 105, Ir.; and 7 & 8 Vict. c. 106, § 40, Ir.

(e) § 23, after reciting that "for want of power in the Court to order payment of the expenses of any prosecution for a *misdemeanor*, many individuals are deterred by the expense from prosecuting persons guilty of misdemeanors, who thereby escape the punishment due to their offences;" for remedy thereof, enacts, "that where any prosecutor or other person shall appear before any court¹, on recognizance or subpoena², to prosecute or give evidence against any person indicted of *any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, or of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person*³, of wilful and corrupt perjury, or of subornation of perjury, every such Court is hereby authorised and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorised and empowered to order the same in cases of felony; and, although no bill of indictment be preferred, it shall still be lawful for the Court, where any person shall have bona fide attended the court in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate." §§ 24 and 25 provide, that the order for payment shall be made out by the proper

¹ See note 1 in page 808.

² The expenses of a prosecutor, whose name is included in a subpoena, are not confined, under this section, to his costs as a witness only, though he has not been bound over by the magistrate to prosecute. *R. v. Sheering*, 7 C. & P. 440, by all the judges. See *R. v. Jeyes*, 3 A. & E. 416.

³ An assault with intent to incite to an unnatural crime, though the indictment allege an indecent, but not public, exposure, is not an offence within this section, and therefore, where a rule was made to pay the prosecutor his expenses, the Court, on motion, set it aside. *R. v. —*, 8 A. & E. 589; 3 N. & P. 627, S. C.

been especially active in apprehending the offenders (*f*). The amount of the costs allowed varies according to the place where the trial is heard, each Quarter Sessions being authorized, with

officer of the court, and that the money shall be paid by the treasurer¹ of the county, &c., or by such other person as is mentioned in the Act. § 27 provides for the payment of the expenses of prosecutions in the Court of Admiralty. The stat. 4 & 5 Will. 4, c. 36, § 12, enacts that any two judges of the Central Criminal Court may order the costs of prosecutors and witnesses to be paid by the treasurer of the county in which, but for that Act, the offender would have been tried. The Act of 7 Will. 4 & 1 Vict. c. 44, enacts, "that where any prosecutor or other person shall appear before any court, on recognizance or subpoena, to prosecute or give evidence against any person upon any charge of having *endeavoured to conceal the birth of any child*, every such court is hereby authorised and empowered, whether any bill of indictment for such charge shall or shall not be actually preferred, to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are now by law authorised and empowered to order the same in cases of prosecutions for felony." See 7 & 8 Vict. c. 106, § 40, as to what remuneration will be allowed to prosecutors and witnesses attending the trial of misdemeanors in the county of Dublin.

(*f*) 7 Geo. 4, c. 64, § 28, enacts, "that where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with *murder*², or with *feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at, any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with felonious housebreaking*³, or with *robbery on the person, or with arson, or with horsetealing, bullock-stealing*⁴ or *sheepstealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen*, every such court is hereby authorised and empowered, in any of the

¹ If the treasurer refuses to pay the expenses in obedience to the order, the remedy is by indictment, and not by mandamus, *R. v. Jeyes*, 3 A. & E. 416. See 5 A. & E. 812, n.; but to render the treasurer liable to prosecution, the entire order of the Court must be served upon him; and therefore, where the order was to pay an aggregate sum, the details being annexed, and the attorney tore off the paper containing the details, it was held that the treasurer was justified in refusing to pay. *R. v. Jones*, 2 Moo. C. C. 171; 9 C. & P. 401, S. C.

² An indictment for *attempting to murder by suffocation* is within the spirit of this section, and extra expenses incurred in apprehending the prisoner have been allowed, *R. v. Durkin*, 2 Lew. C. C. 163, per Patteson, J.

³ This, it seems, does not include the crime of sacrilege, *R. v. Robinson*, 1 Lew. C. C. 129, per Hullock, Bolland, and Parke, Bs.

⁴ This word describes a *class* of offences, and includes the crime of stealing cows, heifers, &c., *R. v. Gillbrass*, 7 C. & P. 444.

the assent of one of the superior judges, to fix the scale of remuneration (*g*). It is to be lamented that one uniform scale of costs has not, as in America, been adopted for the whole country.

§ 888. In all criminal cases, the prisoner is entitled, both in this country and in America, to have compulsory process for obtaining witnesses in his favour (*h*); but, to the disgrace of our

cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the Court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the Court shall seem reasonable and sufficient, to compensate such person or persons for his, her, or their expenses, exertions¹, and loss of time, in or towards such apprehension; and where any person shall appear to *any court of sessions of the peace* to have been active in or towards the apprehension of any party, charged with *receiving stolen property* knowing the same to have been stolen, such Court shall have the power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: Provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively." § 29 provides that the sheriff shall pay the amount awarded, and shall be repaid by her Majesty's treasury; and § 30 enacts, that if any man shall be killed in endeavouring to apprehend any person charged with any of the offences mentioned in § 28, the Court may order the sheriff to pay to his widow, child, father or mother, such sum as in its discretion shall seem meet. The stat. 5 Geo. 4, c. 84, § 22, provides, "that whoever shall discover and prosecute to conviction any offender" being unduly at large within the kingdom, before the expiration of his sentence of transportation or banishment, "shall be entitled to a reward of 20% for every such offender so convicted;" and, though no provision is made in the Act for the mode of recovering the reward, the judges have held that the presiding judge at the trial has power to make an order for its payment on the county treasurer. *R. v. Emmons*, 2 M. & Rob. 279. See the Irish acts of 6 & 7 Will. 4, c. 116, §§ 106, 107; and 7 & 8 Vict. c. 106, §§ 41, 42.

(*g*) 7 Geo. 4, c. 64, § 26. As to the costs usually allowed for witnesses by the masters on the Crown side of the Court of Queen's Bench, see *Corner's Cr. Pr.* App. 164. As to those allowed at the Central Criminal Court, see *Reg.* published 9th March, 1844, 8 Jurist, 80, and 31 Law Mag. 248, n. 2.

(*h*) 2 Hawk. P. C. c. 46, §§ 170, 172; 2 Ph. Ev. 378; 2 Russ. C. & M. 947; Const. U. S. Amendm. Art. 6.

¹ Under this word, a gratuity may be awarded to a prosecutor for his courage in apprehending the prisoner; *R. v. Womersley*, 2 Lew. C. C. 162, per Parke, B.; though he has not been put to any expense, *R. v. Barnes*, 7 C. & P. 166. If the facts do not appear in evidence, the judge will require them to be laid before him on affidavit, *R. v. Jones*, id. 167, per Park, J.

penal laws it must be stated, that no provision has yet been made for reimbursing such witnesses their reasonable expenses, however necessary their attendance may be at the trial, in order to establish the innocence of the accused. The nearest approach to justice, that is at present vouchsafed to prisoners, only extends thus far; that if the constable, as is generally the case, has taken possession of the property found on their persons, the Court, on application, will, for the purposes of their defence, order to be restored to them that portion of it which is not required as a means of proof at the trial, or which does not fairly appear to be the produce of the crime with which they stand charged (*i*).

§ 889. Writs of subpœna may be issued by any Court of Record; but as, at common law, they are plainly of no force beyond the jurisdictional limits of the Court from which they issue, those granted by the clerk of assize or clerk of the peace are compulsory only within a single county or other more limited district; and therefore, if the witness lives beyond these limits, application must be made to the Crown Office, whence subpœnas may issue to any part of England (*k*). In the United States, courts, sitting in any district, are empowered by statute to send subpœnas for witnesses into any other district, provided that, in civil causes, the witness do not live at a greater distance than one hundred miles from the place of trial (*l*); and in this country, the legislature has provided that the service of a subpœna or other process upon any person in any one of the parts of the United Kingdom, requiring the appearance of such person to give evidence in any *criminal prosecution* in any other of the parts of the same, shall be as effectual as if the process had been served in that part where the witness is required to appear. If the person served does not appear, the Court out of which the process issued may, upon proof of service, transmit a certificate of the default under the seal of the Court, or under the hand of one of the judges, to the Court of Queen's Bench in England

(*g*) *R. v. Barnett*, 3 C. & P. 600; *R. v. Jones*, 6 id. 343; *R. v. O'Donnell*, 7 id. 138; *R. v. Kinsey*, id. 447; *R. v. Burgiss*, id. 488; *R. v. Rooney*, id. 515; *R. v. Frost*, 9 id. 131.

(*k*) Crown Cir. Comp. 9, 21; Corner's Cr. Pr. 256, 257.

(*l*) Stat. 1793, ch. 66[22], § 6; 1 LL., U. S., p. 312, Story's ed.

or Ireland, or to the Court of Justiciary in Scotland, according as the writ may have been served in one or other of these parts of the kingdom; and such Courts respectively may punish the person for his default, as if he had refused to appear in obedience to process issuing out of these respective courts (*n*).

§ 890. If a witness, having been duly served with a subpœna, wilfully neglects to appear, he is guilty of *contempt* of Court, and may be proceeded against by *attachment*. In order to render a witness liable to this summary proceeding, it is requisite to show distinctly, though by any species of proof, that, on the cause being called on for trial, he was wilfully absent under such circumstances, that, had the trial proceeded, he would not have been forthcoming when required to give evidence. The jury need not be sworn; and it is no longer necessary even that the witness should be called upon his subpœna before withdrawing the record. This last form is, indeed, usually followed, and the practice is convenient, as furnishing satisfactory and cheap evidence of the absence of the witness. Still it is not essential; and in some cases, as if the witness had gone to France two days before the trial, it would be merely an idle ceremony (*o*).

§ 891. As an attachment for contempt does not proceed upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the Court (*p*), the case must be perfectly clear, to justify the exercise of this extraordinary jurisdiction (*q*). The motion for an attachment should therefore be brought forward as soon as possible (*r*), and the party applying must show by affidavit that a copy of the subpœna was seasonably

(*n*) 45 Geo. 3, c. 92, § 3.

(*o*) *Lamont v. Crook*, 6 M. & W. 615; *Barrow v. Humphreys*, 3 B. & A. 598; *Dixon v. Lee*, 1 C. M. & R. 645; *Mullett v. Hunt*, 1 Cr. & M. 752; *Goff v. Mills*, 2 Dowl. & L. 23, per Wightman, J. These cases overrule *Malcolm v. Ray*, 3 Moore, 222; and *Bland v. Swafford*, Pea. R. 60, and resolve the doubt expressed in *R. v. Stretch*, 4 Dowl. 30; 3 A. & E. 503, S. C.

(*p*) *Barrow v. Humphreys*, 3 B. & A. 600, per Best, J.

(*q*) *Horne v. Smith*, 6 Taunt. 10, 11; *Garden v. Cresswell*, 2 M. & W. 319; *Scholes v. Hilton*, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.; *R. v. Lord J. Russell*, 7 Dowl. 693.

(*r*) *R. v. Stretch*, 4 Dowl. 30; 3 A. & E. 503, S. C.

and personally served on the witness (*s*), that at the time of such service the original writ was shown to him (*t*), that his fees, if he were entitled to them, were paid or tendered (*u*), or the tender expressly waived (*x*), and, in short, that every thing has been done which was necessary to secure his attendance (*y*). It must also appear from the affidavits, that the absence of the witness was an intentional defiance of the process of the Court (*z*); but if this be clearly shown, the witness, as it seems, cannot justify his conduct by proving that his evidence was immaterial (*a*).

§ 892. The fact, however, of immateriality is sometimes important, as tending to negative the existence of wilful misconduct. Thus, the Court refused to grant an attachment against Lord Brougham, when it was evident, from the notes of the judge who tried the cause, that his presence at the trial would not have served the complainant (*b*); and they properly observed, that they would not allow the process of the court to be used for purposes of needless vexation. So, in the case of Lord John Russell and Mr. Fox Maule, who had disobeyed writs of subpœna duces tecum, the Court, in discharging the rule for an attachment, relied on the fact that the documents, if produced, would not have been admissible (*c*). In *R. v. Sloman*, the rule for an attachment was refused, the witness having had reasonable ground for believing that he would not be wanted at the trial (*d*). On the other hand, it must be remembered that the duty of attending a court of justice in pursuance of a subpœna is paramount to the duty

(*s*) Ante, § 881.

(*t*) *Garden v. Cresswell*, 2 M. & W. 319; 5 Dowl. 461, S. C.; *Jacob v. Hungate*, 3 Dowl. 456; *R. v. Sloman*, 1 Dowl. 618; *Smith v. Truscott*, 1 Dowl. & L. 530; 6 M. & Gr. 267, S. C.

(*u*) Ante, § 883; *Connor v. —*, Ir. Cir. R. 610, per Pennefather, B.

(*x*) *Goff v. Mills*, 2 Dowl. & L. 23, per Wightman, J.

(*y*) 2 Ph. Ev. 377; *Garden v. Cresswell*, 2 M. & W. 319; 5 Dowl. 461, S. C.

(*z*) *Scholes v. Hilton*, 10 M. & W. 15; 2 Dowl. N. S. 229, S. C.

(*a*) *Chapman v. Davis*, 3 M. & Gr. 609, 611, 612; 4 Scott, N. R. 319; 1 Dowl. N. S. 239, S. C.; *Scholes v. Hilton*, 10 M. & W. 16; 2 Dowl. N. S. 230, S. C. These cases appear to overrule *Tinley v. Porter*, 5 Dowl. 744, and *Taylor v. Williams*, 4 M. & P. 59.

(*b*) *Dicas v. Lawson*, 1 C. M. & R. 934.

(*c*) 7 Dowl. 693.

(*d*) 1 Dowl. 618.

of obedience to the commands of any master, however stringent and express those commands may have been (e); and on this ground, an attachment has issued against an attorney, who, being served with a subpœna to attend a trial on the following day, went in the morning to a board of guardians to discharge his duty as clerk, and found on his return that the cause had been unexpectedly called on in his absence. The Court held that he had no right to speculate on the chance of being in time (f). Of course, if the witness be too ill to attend (g), or if leave of absence has been given him by the attorney of the party requiring his attendance (h), no attachment will lie; and, on ordinary principles of justice, it would seem that if, in a criminal case, where no fees were tendered, a witness, from real poverty, should be unable to obey the summons, he would not be guilty of a contempt (i).

§ 893. Although the Court of Queen's Bench will grant an attachment against a witness for disobeying a Crown Office subpœna to give evidence in an inferior court (j), provided it distinctly appears by affidavit that the inferior court had jurisdiction to examine the witness (k), yet they have no power, either at common law, or by virtue of the act of 45 Geo. 3, c. 92 (l), to interfere, unless the writ has issued from the Crown Office (m); and consequently, in all those cases where the process is granted by the clerk of assize, or clerk of the peace, and the witness disobeys the summons, the inferior court is driven to proceed against him, either by the doubtful and arbitrary course of fining him in his absence for the contempt (n), or by the tedious, and therefore useless, process of indictment. It may be said, that those who wish to have the attendance of witnesses enforced by the authority of the Court of Queen's Bench may always effect this purpose by obtaining a subpœna from the Crown

(e) *Goff v. Mills*, 2 Dowl. & L. 23, 28, per Wightman, J.

(f) *Jackson v. Seager*, 2 Dowl. & L. 13, per Wightman, J.

(g) *Re Jacobs*, 1 Har. & W. 123. See *Scholes v. Hilton*, 10 M. & W. 15.

(h) *Farrah v. Keat*, 6 Dowl. 470.

(i) 2 Ph. Ev. 383.

(j) *R. v. Ring*, 8 T. R. 585.

(k) *R. v. Vickery*, 16 L. J. N. S. M. C. 69.

(l) As to which Act, see ante, § 889.

(m) *R. v. Brownell*, 1 A. & E. 598.

(n) See *R. v. Clement*, 4 B. & A. 218. In that case the fine was imposed by one of the superior judges. Qu. whether the justices at sessions could safely exercise the like power.

Office; but in remote counties this course is highly inconvenient, as it occasions a considerable loss of time, and, if a town agent be employed, a needless additional expense. A much more simple and effectual method might be adopted, if the legislature would enact, that every inferior court should, like the Crown Office, have the power of issuing subpoenas for witnesses, in whatever part of the country they might reside, and that the Court of Queen's Bench should enforce obedience to such subpoenas by the ordinary process of attachment. The wholesome dread of this proceeding would, on the one hand, render it seldom necessary to have recourse to it; and the necessity for paying the expenses of the witnesses would, on the other, render parties unwilling to summon persons whose presence was not materially requisite. It is only reasonable and just, that every court, having power definitively to hear and determine any suit, should be enabled, without being driven to a circuitous mode of proceeding, to call for all adequate proofs of the facts in controversy, and, to that end, to summon and compel the attendance of witnesses.

§ 894. If a very flagrant case of palpable contempt is shown, such as an express and positive refusal to attend, the Court will, it seems, grant an attachment in the first instance; otherwise the usual course is to grant a rule to show cause (*o*). It is hardly necessary to add, that if a witness duly served, and having his expenses paid, refuses in court to be sworn or to testify, he is guilty of contempt, and may, as in all cases of contempt, be punished by fine and imprisonment, at the discretion of the Court (*p*).

§ 895. Besides the mode of proceeding by attachment, the party injured in a civil suit by the non-attendance of a witness has his remedy, either by *action of debt* under the statute 5 Eliz. c. 9 (*q*), or by *action on the case* for damages at common law. Recourse is seldom had to the action of debt, because, though the party aggrieved may recover in this form of action the penalty of 10*l.*,

(*o*) Anon., Salk. 84; R. v. Jones, Stra. 185; 4 Bl. Com. 287; Jackson v. Mann, 2 Caines, 92; Andrews v. Andrews, 2 Johns. Cas. 109; Thomas v. Cummins, 1 Yeates, 1.

(*p*) 4 Bl. Com. 284—288.

(*q*) As to which Act, see ante, § 883.

in addition to what the Court might assess as a satisfaction in damages, yet this assessment must be made, not by the jury or judge at *Nisi Prius*, but by the court out of which the process issued; and, this being an inconvenient course, it is more advisable to rely on the remedy by attachment, where, if the witness redeems his offence by making satisfaction to the party, the Court will, in general, remit the punishment (*r*).

§ 896. The *action on the case* for damages is more frequent, and to support this action it is not necessary, any more than in proceeding by attachment, to show that the jury were sworn, or that the witness was called upon his subpœna (*s*); neither does it seem to be required that the declaration should contain a direct and positive averment that the party had a good cause of action or a good defence, but it will be sufficient to state and prove, that the witness was material, and that the party could not safely proceed to trial in his absence (*t*). It seems that the same strictness of proof with respect to the form and service of the writ, as is necessary to render the witness guilty of contempt, will not be requisite in order to sustain the action (*u*); and it has been held, that, although for the purpose of bringing the witness into contempt the original writ must be shown at the time when the copy is served, this course is not necessary as the foundation of an action, unless, perhaps, when a sight of the writ has been expressly demanded by the witness (*x*).

§ 897. When the *witness is in custody*, the writ of subpœna is of no avail, and the party requiring his evidence must apply for a *habeas corpus ad testificandum*. The granting of this writ is now in several cases regulated by statute. Thus, the Act of 43 Geo. 3, c. 140, provides, that any judge of the Courts at Westminster may, at his discretion, award a writ of habeas corpus for bringing any prisoner, detained in a gaol or prison in England, before any

(*r*) *Pearson v. Isles*, 2 Doug. 556, 560, 561, per Lord Mansfield.

(*s*) *Lamont v. Crook*, 6 M. & W. 615. See ante, § 890, and cases there cited.

(*t*) *Mullett v. Hunt*, 1 Cr. & M. 752; *Davis v. Lovell*, 4 M. & W. 678. See *Needham v. Fraser*, 1 Com. B. 815, cited ante, § 221.

(*u*) *Davis v. Lovell*, 4 M. & W. 684, 686, per Parke, B.

(*x*) *Mullett v. Hunt*, 1 Cr. & M. 758, per Bayley, B.

court-martial, any commissioners of bankrupt, commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant, for trial, or to be examined touching any matter depending before such courts-martial or commissioners; and the statute 44 Geo. 3, c. 102, enacts, that a judge of any of the Superior Courts in England or Ireland may, at his discretion, grant a habeas corpus to bring up *any prisoner*, detained in a gaol or prison, before *any Court of Record*, to be there examined as a witness, and to testify the truth before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal, depending, or to be inquired into or determined, in any such court. Again, the Acts of 1 Will. 4, c. 22, and 3 & 4 Vict. c. 105, which respectively relate to England and Ireland, and were passed to enable witnesses to be examined by commissioners in certain cases, before the trial of the cause in which their testimony would be required, enact,—the first in § 6, the second in § 71,—that “it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of that Act, by virtue of a writ of habeas corpus to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances, and in such manner, as such court or judge may now by law issue the writ commonly called a writ of habeas corpus ad testificandum.”

§ 898. The application for a writ under either of the two first-mentioned statutes, if not under the last two, must be made to a judge at chambers (*y*), on an affidavit, stating the place and cause of confinement of the witness, that his evidence is material, and that the party cannot, in his absence, safely proceed to trial (*z*); and if the prisoner be confined at a great distance from the place of trial, the judge will perhaps further require that the affidavit should point out in what manner his testimony is material (*a*). If the witness be required to give evidence in a civil suit, it is

(*y*) Gordon's case, 2 M. & Sel. 582; Browne v. Gisborne, 2 Dowl. N. S. 963, per Coleridge, J.

(*z*) See the form, Chit. Forms, 60; Corner's Cr. Pr., App. 66.

(*a*) Standard v. Baker, cited 2 Tidd's Pr. 858.

usual to add in the affidavit that he is willing to attend ; but this would seem, on principle, to be a needless averment, and it is certainly unnecessary in criminal proceedings (*b*).

§ 899. Before the passing of the statute 44 Geo. 3, c. 102, it was held that neither a *prisoner* in custody for *high treason* (*c*), nor a *prisoner of war* (*d*), could be brought up by a habeas corpus ad testificandum ; and Lord Mansfield stated, with respect to the prisoner of war, that application should be made to the secretary of state. The Court, however, on the secretary of state refusing to interfere, granted a rule to show cause why the adverse party should not consent, either to admit the facts, or that the prisoner should be examined on interrogatories ; adding, that if this consent should be refused, they would put off the trial from time to time, in order to give the applicant an opportunity of filing a bill in equity. It may now be fairly questioned whether the words of the Act, "*any prisoner detained in any prison*," would not be sufficiently large to warrant the interference of the judge in both these cases ; and though considerations of state policy might, perhaps, lead the judges to narrow the interpretation of the statute in the case of prisoners of war, no valid reason can be urged why prisoners charged with high treason should not be placed on the same footing as other prisoners. It should here be observed that, in consequence of Lord Denman's Act having rendered convicted prisoners competent witnesses (*e*), applications for writs of habeas corpus will probably be far more frequent than they formerly were.

§ 900. Independent of the powers expressly granted to the judges by the acts above mentioned, the Courts at Westminster would seem, at *common law* (*f*), to possess the right of awarding writs of habeas corpus ad testificandum in certain cases, though the extent of their authority is not distinctly defined. The legislature has indirectly recognised their power to bring persons detained in *custody* under civil or criminal process before

(*b*) Corner's Cr. Pr. 118.

(*c*) Langston v. Cotton, Pea. Ad. R. 21.

(*d*) Farly v. Newnham, 2 Doug. 419.

(*e*) 6 & 7 Vict. c. 85, § 1.

(*f*) See R. v. Freind, 13 How. St. Tr. 2, 3 ; R. v. Burbage, 3 Burr. 1440.

(*g*) See preamble of 43 Geo. 3, c. 140, and Ex parte Griffiths, 5 B. & A. 730.

magistrates or Courts of Record (*g*); and the judges themselves have claimed the right of granting these writs in other analogous cases (*h*). Thus, a writ has been awarded to bring up the body of a person confined as a lunatic, for the purpose of giving evidence in a cause, on an affidavit that he was not dangerous, and was in a fit state to be examined (*i*). So, a habeas corpus has issued from the Court of Queen's Bench to bring up a prisoner committed by that Court for non-payment of a fine, to give evidence before an election committee, on an affidavit that the rule to show cause had been served on the under-sheriff, the solicitor of the Treasury, the prisoner himself, and the party at whose suit he was in execution, and no cause being shown (*k*). On a similar application being subsequently made to the Court, the only difference being that the prisoner was in custody on a charge of felony, the Judges doubted their power, but granted a rule nisi, directing notice to be given to the Attorney-General, the committing magistrate, the person having the custody of the prisoner, and all parties at whose suit he might be detained on civil process (*l*). It became unnecessary to call upon the Court to make this rule absolute. Again, if the witness is in the military or naval service, and therefore not at liberty to attend without the leave of his superior officer, which he cannot obtain, he may be brought into court to testify by a writ of habeas corpus; but in such case, the Court of Queen's Bench will refuse to award the writ, unless the affidavit states that the witness has been served with a subpoena, and is willing to attend; for a free man cannot be brought up as a prisoner against his consent (*m*). In all these cases the writ will be directed to the gaoler, sheriff, commanding officer, or other person, in whose custody, or under whose control, the witness is detained, who, on being served with it, and being paid or tendered his reasonable

(*h*) See *In re Cook*, 7 Q. B. 653, where the Court refused to issue a writ of habeas corpus to bring up a prisoner who had been committed on a charge of murdering A., before a coroner's jury, who were sitting on A.'s body, for the purpose of his being *identified* by the witnesses. In this case, the judges seemed to be of opinion, that they had power to issue such writ in a case of necessity. See also, *Daniel v. Thompson*, 15 East, 78; *Att.-Gen. v. Fadden*, 1 Price, 403.

(*i*) *Fennell v. Tait*, 1 C. M. & R. 584.

(*k*) *Re Price*, 4 East, 587.

(*l*) *Re Pilgrim*, 3 A. & E. 485; 4 Dowl. 89, S. C. nom. *R. v. Pilgrim*.

(*m*) *R. v. Roddam*, 2 Cowp. 672.

charges, will be bound to produce the witness according to the exigency of the writ.

§ 901. A more summary mode of obtaining the attendance of witnesses in custody, may, in certain cases, be adopted in Ireland under the provisions of the statute 38 Geo. 3, c. 26, § 2, which enacts, that "it shall be lawful for the justices of Assize, or Nisi Prius, or the commissioners of oyer and terminer and gaol delivery, by order in writing to be by them respectively signed, to direct any person in execution, and in the custody of any sheriff or other officer, in any county wherein they shall sit, to be brought up for the purpose of giving evidence in any cause or trial to be had before them respectively."

§ 902. Besides these modes of enforcing the attendance of witnesses, which apply generally to proceedings before courts of ordinary common-law jurisdiction, more or less compulsory powers for the same purpose are intrusted to many courts or persons having a limited or special jurisdiction. The limits of this work will not admit of a full analysis, or even a complete enumeration of these powers, but a brief sketch will be given of such as appear to be of general importance.

§ 903. In *Courts of Equity*, witnesses are summoned by subpoena (*n*), whether they be required to give their evidence *vivâ*

(*) The mode of issuing subpoenas in equity is regulated partly by the Act of 3 & 4 Will. 4, c. 94, § 31, and partly by the new Orders in Chancery, E. T. 1845, made in pursuance of the Acts 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52. § 31 of 3 & 4 Will. 4, c. 94, enacts that the patentee of the subpoena office shall provide a seal; that any person desirous of issuing a writ of subpoena, such as has heretofore been issued by such patentee, may prepare it, and present it for sealing; "and such writ shall, upon presentment thereof for that purpose, be forthwith sealed with such seal, and shall have the same force and validity as a writ of subpoena now has when sealed with the great seal." The Chancery Orders bearing on the subject are as follows:—

XXIV. All writs of subpoena in this court are to be prepared by the solicitor of the party requiring the same; and the seal for sealing the same is to be marked or inscribed with the words Subpoena Office, Chancery; and such writs are to be in the terms mentioned at the foot of these orders, or as near as may be, with such alterations and variations as circumstances may require.

XXV. In the interval between the suing out and service of any subpoena, the party suing out the same may correct any error in the names of parties or

voce in court, or to testify before the Master, or to answer interrogatories before the examiners of the court, or one of the two commissioners (o) appointed for the purpose of hearing evidence in the

witnesses, and may have the writ resealed, upon payment to the clerk of the subpoena office of a fee of 1s., and at the same time leaving a corrected præcipe of such subpoena marked, altered, and resealed, and signed with the name and address of the solicitor or solicitors suing out the same.

Forms of Subpoena referred to above.

Subpoena to testify vivâ voce in Court, or to testify before the Master.

Victoria, &c.

To —, greeting.

We command you [and every of you] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before our Lord High Chancellor [or, before his Lordship, or Honour, the Master of the Rolls, or before Mr. —, one of the Masters of our High Court of Chancery, or before E. F., or G. H., commissioners named in a commission issued to them for that purpose], at such time and place as the bearer hereof shall by notice in writing appoint, to testify the truth according to your knowledge in a certain suit now depending in our High Court of Chancery, wherein A. B. [and others, or another, are or] is plaintiff [or, plaintiffs], and C. D. [and others, or another, are or] is defendant [or, defendants], on the part of the —. [in case of subpoena duces tecum, add, and that you then and there bring with you and produce, &c.] And hereof fail not at your peril.

Witness, &c.

DEVON.

Subpoena ad test. and Subpoena duces tecum.

Victoria, &c.

To —, greeting.

We command you [and every of you] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Mr. —, one of the examiners of witnesses in our High Court of Chancery, at his office in Rolls Yard, Chancery Lane, London, at such times as the bearer hereof shall by notice in writing appoint, [or, before E. F., or G. H., commissioners appointed for the examination of witnesses in our Chancery, at such times and places as the bearer hereof shall by notice in writing appoint], to testify the truth according to your knowledge, in a certain cause depending in our said Court of Chancery, wherein A. B. [and others, or another, are or] is plaintiff [or, plaintiffs], and C. D. [and others, or another, are or] is defendant [or, defendants], on the part of the —. [in case of subpoena duces tecum, add, and that you then and there bring with you and produce, &c.] And hereof fail not at your peril.

Witness, &c.

DEVON.

(o) Commissions to examine witnesses are now regulated by the following Chancery Orders of E. T. 1845 :—

XCIV. Commissions to examine witnesses within the jurisdiction of the Court are to be directed to *two commissioners only*, and, unless the Court otherwise

particular cause; but in either event, it is usual to accompany the writ of subpoena with a *notice in writing* of the time and place of examination. The witness, as at common law, must be paid or

orders, are to be made returnable without delay; and the commissioners are to be either barristers or solicitors, not concerned in the cause, and each one of such two commissioners is to have all such power and authority to examine witnesses, as have heretofore been vested in the acting commissioners, named in the commissions to examine witnesses which have heretofore been issued; but the commissioner first named in the commissions to be hereafter issued is alone to act in the execution of any commission, unless he is, by illness or other sufficient cause, incapacitated from acting therein, in which case the commissioner secondly named is alone to act in the execution of such commission.

XCV. Immediately after the replication is filed, the plaintiff, if he thinks fit, may give notice to all other parties entitled to examine witnesses in the cause, of his intention to sue out a commission for that purpose; and the plaintiff, if he gives such notice within two days after the filing of the replication, or before any defendant has given notice of his intention to sue out a commission, is to have the carriage of the commission.

XCVI. After the expiration of two days from the filing of the replication, if the plaintiff has not previously given notice to all other parties entitled to examine witnesses in the cause, of his intention to sue out a commission for that purpose, any defendant may give notice to all other parties entitled to examine witnesses in the same cause, of such defendant's intention to sue out a commission for that purpose; and any defendant so giving such notice is to have the carriage of the commission, unless such notice be given by more than one defendant, in which case the defendant who first gave such notice is to have the carriage of the commission.

XCVII. Where the parties entitled to examine witnesses in the cause agree to the nomination of persons to be commissioners, and to the order in which such commissioners are to be named, the record and writ clerk, upon being applied to for the purpose, is to cause a commission directed to such persons to be sealed and delivered to the person entitled to have the carriage thereof.

XCVIII. If all the parties entitled to examine witnesses in the cause have not, within four days after the filing of the replication, agreed to the nomination of persons to be commissioners, any party entitled to examine witnesses in the cause may apply to the Master, to whom any former reference in the cause has been made, or to the Master in rotation, in case no former reference has been made, for a warrant, returnable in two days, requiring the other parties to attend for the purpose of having commissioners named; and such Master is to grant such warrant, and the same being duly served, all parties, on the return thereof, are to propose commissioners; and if among the persons so proposed, there are two or more to whom no just objection is made, the Master is to select or nominate and certify to be commissioners such two of the proposed persons as appear to him most proper to perform the duty; but if it appears that no one, or only one of such proposed persons is free from just objection, the Master, as the case may be, is to nominate and certify two proper persons, or to nominate one proper person and certify him and the person free from objection to be the commissioners.

tendered his expenses; and then, if he refuse to attend, or attending refuse to be sworn, or to answer legal questions, the Master, examiners, or commissioners may certify his misconduct to the

XCIX. If any question arises as to the commissioner who is to be first named, or as to the party who is to have the carriage of the commission, the Master is to determine such questions, and to name the party who is to have the carriage of the commission.

C. If any party entitled to examine witnesses in a cause shall desire to have any additional commission or commissions, application is to be made to the Master for leave to sue out such additional commission or commissions; and upon the Master's certificate that such additional commission or commissions is or are proper to be issued, the same may be sued out in the same manner as a first or only commission; and in case the parties do not agree, any question respecting the commissioners to be named, or the order in which they are to be named in the commission, or any question respecting the carriage of any such additional commission, is to be settled by the Master, as in the case of a first or only commission.

CI. The Master is to deliver his certificate of the nomination of the commissioners to the solicitor of the party who is to have the carriage of the commission; and such solicitor is, on the same day, or, at the latest, on the day next following the date of the Master's certificate, to file the same, and is within two days from the date thereof to take an office copy thereof to the record and writ clerk, who is on the same day, or, at the latest, on the day next following his receipt of such office copy, to seal a commission directed to the persons named in the certificate, and to deliver such commission to the solicitor from whom he received the certificate; and such solicitor having received the commission is, within one week after the teste thereof, to deliver the same to the commissioner therein first named, if he be at the time able to act in the execution of the commission, but if not, then to the commissioner secondly named.

CII. If any solicitor having the carriage of a commission, does not, within six days after the date of the Master's certificate, obtain the commission, and duly deliver the same to the commissioner by whom the same is to be executed, any other party entitled to examine witnesses may apply to the Master for leave to take out a new commission directed to the same commissioners, and to have the carriage of such commission; and the costs of such application are to be paid by the party in default, whether the application succeeds or not.

Form of Commission.

CIII. The form of a commission to be hereafter issued for the examination of witnesses is to be as follows, with such (if any) variations as the circumstances of the case require:—

Victoria, &c.

To A. B. and C. D., greeting.

Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto each of you full power and authority, diligently to examine all witnesses whatsoever, upon certain interrogatories to be exhibited to you in a cause wherein E. F. is complainant, and G. H.

Court; and the Court, on motion, supported by this certificate, and by an affidavit of service of the subpoena and the notice, will order him peremptorily to do the act required; and on his still

and others are defendants; and therefore we command, that one of you do, at certain days and places to be appointed for that purpose, cause the said witnesses to come before you, and then and there examine each of them, apart, upon the said interrogatories, either on their respective corporal oaths first taken before you upon the Holy Evangelists, or in the case of Quakers, upon their solemn affirmation and declaration, or in such other solemn manner as is or may be authorised by law, and that you do take such their examinations, and reduce them into writing on parchment; and when you shall have so taken them, you are to send the same to us in our Chancery without delay, wheresoever it shall then be, closed up and under your seal distinctly and plainly set, together with the said interrogatories and this writ. And we further command you, that before you act in or be present at the swearing or examining any witness or witnesses, you do take the oath first specified in the schedule hereunder annexed. And we further command that all and every the clerk or clerks employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses to be examined by virtue of these presents, shall, before he or they be permitted to act as clerk or clerks as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule annexed; and we also give to you full power and authority to administer such oath to such clerk or clerks in manner aforesaid. Witness ourself at Westminster, the — day of — in the — year of our reign.

LANGDALE.

(*Endorsement.*)

By order of the Court.

(*Name and address of Agent and Solicitor issuing Writ.*)

CIV. The oath to be taken by a commissioner is to be set forth in a schedule annexed to the commission, and is to be in the form following, viz. :—

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses, produced and examined by virtue of the commission hereunto annexed, upon the interrogatories produced and left with you; and you shall not publish, disclose, or make known to any person or persons whatsoever, except to the clerk or clerks by you employed and sworn to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any of them, to be taken by you by virtue of the said commission, until publication shall pass pursuant to some general or special order of the High Court of Chancery.

So help you God.

And the said oath is to be taken by the commissioner, who is to act in the execution of the commission, previously to his acting therein, before any Master in Ordinary or before any Master Extraordinary of the court who is not employed or

refusing, will, on a second application being made for that purpose, commit him for contempt, or will sometimes compel him to appear

concerned in the cause ; and such Master Extraordinary is hereby authorised and required to administer such oath.

CV. The oath to be taken by the clerk or clerks employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses to be examined by virtue of a commission, is to be set forth in a schedule annexed to the commission, and is to be in the form following, viz :—

You shall truly and faithfully, without partiality to any or either of the parties in this cause, take and write down, transcribe and engross, the depositions of all and every witness and witnesses produced before and examined by either of the commissioners named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioner to take, write down, or engross the said depositions, or any of them ; and you shall not publish, disclose, or make known, to any person or persons whatsoever, the contents of all or any of the depositions of the witnesses or any of them to be taken, written down, transcribed, or engrossed by you, or whereto you shall have recourse, or be any ways privy, until publication shall pass pursuant to some general or special order of the High Court of Chancery.

So help you God.

And the said oath is to be taken before the acting commissioner, by the clerk or clerks employed as aforesaid, before he or they be permitted to act as such clerk or clerks, or to be present at the examination of witnesses under the commission, and the commissioner is hereby authorised and required to administer the said oath to such clerk or clerks accordingly.

CVI. The commissioner having taken such oath is, at the instance of any party entitled to examine witnesses, to sign and deliver to such party a notice in writing, specifying the time and place when and where he will proceed to examine witnesses, and such notice is to be duly served by the party who obtains it upon the solicitors of all the other parties entitled to examine witnesses under the commission, and in case any such party has no solicitor, upon such party, at least ten clear days before the day therein named for proceeding to examine witnesses.

CVII. All depositions of witnesses are to be taken and expressed in the first person of the deponent.

CVIII. If the examination of witnesses cannot be completed in one day, and the circumstances of the case permit, the commissioner is to proceed *de die in diem*, during six hours of each day, between the hours of eight in the morning and six in the afternoon, until the witnesses for all parties are fully examined ; nevertheless, the commissioner may, if in his opinion the circumstances of the case require an adjournment, adjourn the proceedings, from time to time and from place to place, in such manner as he thinks proper ; but he is in all cases to enter on the depositions any adjournment, and where such adjournment is from place to place or otherwise than *de die in diem*, the cause or reason of such adjournment, and he is also to enter on the depositions the hours of the day on which he commences and concludes the examination of witnesses on each day, and the true cause of his not proceeding for the full time of six hours on each day, if such should be the case.

and be examined in court at his own costs (*p*). The Master, examiners, and commissioners are respectively authorised to administer oaths; the first, by virtue of his office; the second, under the Act of 3 & 4 Will. 4, c. 94, § 27; and the last, by the express language of the commission (*q*); but none of these persons are empowered either to compel the attendance, or to punish the misconduct, of witnesses, except by resorting to the cumbrous and costly process stated above. Some able men, well acquainted with the practical working of the present system, have strenuously urged the propriety of strengthening the hands of those parties who are intrusted with the task of taking the depositions, and of enabling them, without first applying to the Court, to punish the improper conduct of witnesses (*r*); but, as yet, this measure, though well deserving of serious consideration, has not been sanctioned by the legislature.

§ 904. Witnesses required to give evidence, either before the *House of Lords*, or before any of the *Lords' committees*, are served with an order of the House, signed by the assistant clerk of the Parliaments, which directs them to attend at the bar on a certain day to be examined or sworn (*s*). The service must, generally, be personal, but if the witness be purposely keeping out of the way, it is usual to direct that a service at his house should be deemed

CIX. When the examination of witnesses is completed, the commissioner is to seal up the depositions, and is to transmit the same, sealed up with the commission, to the record and writ clerk's office.

CX. The commissioner is, for the performance of his duty as such commissioner, entitled to receive the following sums of money, viz. :—

For every day in which he is necessarily and without any default of his own, detained in the execution of the commission, for his expenses the sum of	£ s. d.
For every day in which he is <i>bonâ fide</i> employed in the examination of witnesses, the further sum of	2 2 0
For every mile that he travels directly from his place of residence to the place where he opens the commission, and from place to place where the commission is adjourned, and from the place where he last acts in the execution of the commission to his place of residence, the sum of	3 3 0
	0 1 6

(*p*) Grealey, Ev. 59, 74—76.

(*q*) See the form in note (*o*), p. 825, ante.

(*r*) See Grealey, Ev. 59.

(*s*) 66 Lords' J. 400.

sufficient (*t*). If he disobey this summons, the House will order him to be taken into custody, either forthwith (*u*), or after the expiration of a certain time (*w*); and if the black rod cannot succeed in taking him, the House will address the Crown to issue a proclamation, offering a reward for his apprehension (*x*). When the evidence of peers, peeresses, or Lords of Parliament is required, the Lord Chancellor is ordered to write letters to them, desiring their attendance to be examined as witnesses (*y*); and such persons are sworn by the Lord Chancellor at the table (*z*), while all other witnesses are sworn at the bar by the officer of the House (*a*). If the witness be a member, or an officer, of the House of Commons, a message is sent to that House requesting his attendance (*b*); upon which the lower House return answer, by their messenger, that they give him leave to attend, adding, in case he be a member, "if he think fit" (*c*). If the witness, on attending, refuse to be sworn, or prevaricate, or otherwise misbehave, he will be punished by the House as for contempt; and if he give false evidence, he may be indicted for perjury (*d*).

§ 905. In the *House of Commons* the course is very similar, witnesses being summoned to attend by an order of the House, signed by the clerk, which is either personally served upon him, or, if he live at a distance, is forwarded to him by post, or sometimes by a special messenger. If, after service, the witness neglect to attend, or if he abscond, the Speaker, by order of the House, will issue his warrant, directing the serjeant-at-arms to apprehend the witness, and to bring him to the bar; whereupon he will generally be committed to Newgate; as will also all persons who aid him in his endeavours to keep out of the way (*e*). If the attendance of a Lord of Parliament, or of an officer of the upper House be desired, the Commons adopt the same form of proceeding as that observed by the Lords, when they require the attendance of a member of the lower House (*f*); but

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| (<i>t</i>) 66 Lords' J. 295. | (<i>u</i>) Id. 400. | (<i>w</i>) Id. 358. |
| (<i>x</i>) Id. 441. | (<i>y</i>) 75 Lords' J. 144. | (<i>z</i>) Id. 201. |
| (<i>a</i>) May, Law of Parl. 243. | | (<i>b</i>) 75 Lords' J. 157. |
| (<i>c</i>) Id. 164. | | (<i>d</i>) May, Law of Parl. 243. |
| (<i>e</i>) Id. 239; Gosset v. Howard, 16 L. J. N. S. Q. B. 348. | | |
| (<i>f</i>) May, Law of Parl. 241, 242; 83 Com. J. 278; 91 id. 75; 82 id. 465. | | |

whether this form be necessary, if the witness be simply a peer or peeress, is a matter upon which the two branches of the legislature appear to be at issue (*g*). If the testimony of a member be desired by the House, or by a committee of the whole House, he is ordered to attend in his place; but if he be required to give evidence before a select committee, such committee should request his attendance, and if he refuse to appear, should acquaint the House therewith, who will then order him to attend, and, if necessary, will even commit him to the custody of the serjeant-at-arms, that he may be forthcoming at the proper time (*h*). If a person in custody is required to give evidence, it is usual for the Speaker to issue his warrant, which is personally served on the gaoler by a messenger of the House, and by which he is directed to bring the witness in his custody to be examined (*i*). Some doubts, however, have been entertained as to the legality of this course, and on one or two occasions, writs of habeas corpus ad testificandum have, in order to protect the gaoler, been applied for in the Court of Queen's Bench (*j*).

§ 906. If the witness is to be examined before a *select committee*, the chairman, by direction of the committee, in general signs an order for his attendance; and if this order be disobeyed, his conduct is reported to the House, who immediately issue the usual order, to be enforced as in other cases. The attendance of a witness before a committee on a private bill can only be enforced by an order of the House (*k*).

§ 907. The mode of proceeding where witnesses are required to attend before *election committees*, is regulated by the Act of 7 & 8 Vict. c. 13, which, in § 77 (*l*), enacts, that the select committee to whom the election petition is referred, "shall have

(*g*) May, Law of Parl. 242, 243; 4 Lords' J. 812. (*h*) May, Law of Parl. 240, 241.

(*i*) Id. 239; 90 Com. J. 533. The order of the House of Lords has been used for the same purpose, May, Law of Parl. 238.

(*j*) See ante, § 900; Re Price, 4 East, 587; Re Pilgrim, 3 A. & E. 485.

(*k*) May, Law of Parl. 240; 98 Com. J. 153, 174, 279, 288.

(*l*) As to the mode of summoning witnesses before commissioners appointed to take evidence in Irish election petitions, see 42 Geo. 3, c. 106, §§ 23, 28, 29, 30, mentioned post, § 933.

power to send for persons, papers, and records, and to examine any person who may have subscribed the petition, which such select committee shall have been appointed to try, *unless* it shall otherwise appear to such committee that *such person is an interested witness*, and shall examine all the witnesses who come before them *upon oath*, which oath the clerk attending such select committee is hereby empowered to administer; and if any person summoned by such select committee, or by the warrant of the Speaker of the House of Commons (which warrant the Speaker is hereby authorised to issue from time to time as he shall think fit), shall disobey such summons, or if any witness before such select committee shall give false evidence, or prevaricate, or shall otherwise misbehave in giving or refusing to give evidence, the chairman of such select committee, by their direction, may, at any time during the course of their proceedings, report the same to the House for the interposition of the authority or censure of the House, as the case may require, and may by a warrant under his hand directed to the serjeant-at-arms attending the House of Commons, or to his deputy or deputies, commit such person (not being a Peer of the realm or Lord of Parliament) to the custody of the said serjeant, without bail or mainprize, for any time not exceeding twenty-four hours, if the House shall then be sitting, and if not, then for a time not exceeding twenty-four hours after the hour to which the House shall be adjourned" (m). This section is remarkable for two reasons; first, because, by impliedly providing that interested witnesses, who have subscribed the petition, shall not be examined, it lays down a rule different from that which, since Lord Denman's Act (n), has prevailed in courts of justice; and secondly, because it furnishes the only instance of the House of Commons, or of any committee of that House, being authorised to administer an oath. That the House of Commons does not enjoy this power, intrusted as it is to every justice of the peace and insignificant commissioner, is certainly a curious historical fact; but the anomaly is productive of but little practical evil; for, although the giving false testimony before the House of Commons does not render the witness liable

(m) §§ 93—97 provide, among other things, the mode by which the expenses of witnesses shall be taxed and paid.

(n) 6 & 7 Vict. c. 85.

to the penalties of perjury, it subjects him to punishment as guilty of a breach of privilege; and many cases may be found in the Journals, where parties, who have stated falsehoods, or prevaricated, or suppressed the truth, or refused either to answer questions, or to produce documents in their possession, have been given into the custody of the serjeant-at-arms, or even committed to gaol (o).

§ 908. The attendance of witnesses before the *Ecclesiastical Courts* is required by a *compulsory*, which is an instrument somewhat in the nature of a subpoena (p). If the witness on the return of this process does not appear, the Court may pronounce him contumacious (q); and on certifying the same to the Lord Chancellor within ten days, a writ de contumace capiendo will issue, unless the party be a Peer or Lord of Parliament, or a member of the House of Commons, whereupon he will be arrested and detained in custody, until he either submit to the Court, or be absolved or discharged by order of the ecclesiastical judge (r). His expenses, however, must be tendered or paid by the party calling him, as in civil proceedings before the common-law courts (s). The Act for better enforcing Church Discipline (t), which authorises bishops to issue commissions of inquiry into the grounds of any charge or report against clerks in holy orders, and which empowers bishops to take ulterior proceedings against such clerks, reserving to the latter the right of appeal to the provincial

(o) At the commencement of each session, the two following resolutions are passed by the House:—

1st. "That if it shall appear that any person hath been tampering with any witness, in respect to his evidence to be given to this House, or any committee thereof, or directly or indirectly hath endeavoured to deter or hinder any person from appearing or giving evidence, the same is declared to be a high crime and misdemeanor; and this House will proceed with the utmost severity against such offender.

2nd. "That if it shall appear that any person hath given false evidence in any case before this House, or any committee thereof, this House will proceed with the utmost severity against such offender."—See May, Law of Parl. 245.

(p) 3 Burn's Eccl. Law, 310.

(q) Wyllie v. Mott, 1 Hagg. Ecc. R. 34.

(r) 2 & 3 Will. 4, c. 93, § 1.

(s) Ayliffe, Parerg. 536; 1 Ought. 121; 3 Burn's Eccl. Law, 309.

(t) 3 & 4 Vict. c. 86.

Court of Appeal, provides, in § 17, "that it shall be lawful, in any such inquiry, for any three or more of the commissioners, and in any such proceeding, for the bishop, or for any assessor of the bishop, or for the judge of the Court of Appeal of the province, to require the attendance of such witnesses, and the production of such deeds, evidences, or writings, as may be necessary; and such bishop, judge, assessor, and commissioners respectively, shall have the same powers for these purposes as now belong to the Consistorial Court and to the Court of Arches, respectively." So the Act of 6 & 7 Vict. c. 62, provides, in § 2, that any two or more of the commissioners appointed under that Act to inquire into the mental capacity of archbishops or bishops, may "require the attendance of such witnesses as may be necessary; and such commissioners respectively shall have the same powers for this purpose as now belong to the Consistorial Court and the Court of Arches, respectively."

§ 909. The mode of enforcing the attendance of witnesses before the *High Court of Admiralty* is regulated by the Act of 3 & 4 Vict. c. 65, which, by § 9, provides, that the judge of that court, or any commissioner appointed in pursuance of that Act, may require the attendance of any witnesses, and the production of any deeds, evidences, books, or writings, by writ to be issued by such judge or commissioner, in such and the same form, or as nearly as may be, as that in which a writ of subpoena ad testificandum, or of subpoena duces tecum, is now issued by the Court of Queen's Bench; and that every person disobeying any such writ so to be issued by the said judge or commissioner, shall be considered as in contempt of the said High Court of Admiralty, and may be punished for such contempt in the said court.

§ 910. The annual Mutiny Acts provide, that all witnesses, as well civil as military, who are required to attend *Courts-martial*, whether military or marine, shall, in the case of general courts-martial, be duly summoned by the Judge Advocate-General, or his deputy, or the person officiating as such; and in the case of all other courts-martial, by the President of the court; and in either case, if the witness so summoned shall not attend, or attending

shall refuse to be sworn, or being sworn shall refuse to give evidence, or to answer all such questions as the Court may legally demand of him, he shall be liable to be attached in the Court of Queen's Bench in London or Dublin, or Court of Session or other court of law in Scotland or elsewhere, in the like manner as if he had disobeyed a subpoena or other similar process in such last-mentioned courts (u).

§ 911. The Act of 6 & 7 Will. 4, c. 106, provides for the attendance of witnesses before the court of the *Vice-Warden of the Stannaries*, and enacts, in § 9, that the service of every writ of subpoena to attend and give evidence hereafter to be issued out of either side of the court of the Vice-Warden, and served upon any person in any part of England or Wales, shall be as valid and effectual in law, and shall entitle the party suing out the same to all and the like remedies by action or otherwise, as if the same had been served within the jurisdiction of the court of the Vice-Warden; and that, in case the person so served shall not appear according to the exigency of the writ, the court of the Vice-Warden, upon oath or affirmation to be taken in open court, or affidavit of the personal service of such writ, may transmit a certificate of such default, under the seal of the court, to the Court of Queen's Bench at Westminster; and the last-mentioned court shall proceed against, and punish by attachment or otherwise, according to the course and practice of that court, the person so having made default, in such and the like manner as the same court might have done, if such person had neglected or refused to appear in obedience to a writ of subpoena issued to compel the attendance of witnesses out of such last-mentioned court. § 10 provides, that the Court of Queen's Bench shall not, in any such case as aforesaid, proceed against or punish any person, nor shall any such person be liable to any action for having made default by not appearing to give evidence in obedience to any such writ of subpoena, unless it shall appear to the Court of Queen's Bench that a reasonable and sufficient sum of money, to defray the expenses of coming and attending to give evidence, and of returning therefrom, had been tendered to him, at the time when the writ of subpoena was served upon him.

(u) See 10 & 11 Vict. c. 12, § 15; 10 & 11 Vict. c. 13, § 17.

§ 912. The attendance of witnesses before *coroners* is provided for by statute 7 & 8 Vict. c. 92, § 17, which enacts, "that if any person, having been duly summoned as a juror, or witness to give evidence upon any coroner's inquest, as well of liberties and franchises contributing to the county rates, as of counties, cities, and boroughs, shall not, after being openly called three times, appear and serve as such juror, or appear and give evidence on such inquest," the coroner may impose on him a *fine not exceeding forty shillings*; and the Act then provides, "that nothing therein contained shall be construed to affect any power now by law vested in the coroner, for compelling any person to appear and give evidence before him on any inquest or other proceeding, or for punishing any person for contempt of court, in not so appearing and giving evidence, or otherwise." This proviso, in its present general form, might have been well spared, since the leaving undefined power in the hands of petty officers can seldom be productive of real benefit to the public, and may often furnish an odious mode of annoying and oppressing particular individuals. Still some proviso was necessary, in order to leave unaffected the Act of 6 & 7 Will. 4, c. 89, which, after authorising coroners, in the first five sections, to order *medical witnesses* to attend inquests, &c., and enabling such witnesses to claim a certain remuneration for their attendance (*x*), enacts, in § 6, that, where any order for the attendance of any medical practitioner has been personally served upon him, or where, though not personally served, it has been received by him in sufficient time to be obeyed, or where it has been served at his residence;—in all these cases, the medical man shall, in case of disobedience, *forfeit the sum of five pounds*, upon complaint made by the coroner, or any two of the jury, before two justices having jurisdiction in the place where the inquest was held, or in the parish where the medical practi-

(*x*) The fee to which, in Great Britain, a legally qualified medical practitioner is entitled, for attending to give evidence at an inquest, is one guinea, and for making a post-mortem examination of the deceased, either with or without an analysis of the contents of the stomach or intestines, and for attending to give evidence thereon, is two guineas. See § 3, and Schedule to the Act. These sums must now be paid to the medical man by the coroner immediately after the termination of the proceedings at any inquest, and the coroner will be repaid out of the county rates or borough fund; 7 Will. 4 & 1 Vict. c. 68, §§ 2, 3. See, as to the Irish regulations, 9 & 10 Vict. c. 37, §§ 22, 28, 32—35, 44, and Sched. C.

tioner resides ; and the justices are required, upon such complaint, to adjudicate thereon, and if the medical man does not show good cause for not having obeyed the order, to enforce the penalty by distress and sale of his goods.

§ 913. Notwithstanding the late Acts amending the law of *bankruptcy*, the mode of compelling witnesses to attend before the commissioners is still, in a great measure, regulated by statute 6 Geo. 4, c. 16, which, by § 24, empowers the commissioners to summon before them any person whom they shall believe capable of giving any information concerning the trading of, or any act of bankruptcy committed by, the supposed bankrupt ; and to require such person to produce any books, papers, deeds, writings, and other documents in his custody, possession, or power, which they may deem necessary to establish such trading, or act of bankruptcy. After the adjudication of bankruptcy, the commissioners are further empowered, by § 33, to summon any person known or suspected to have any of the bankrupt's estate in his possession, or who is supposed to be indebted to the bankrupt, or whom the commissioners believe capable of giving information concerning the person, trading, dealings, or estate of the bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt ; and to require such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which the commissioners may deem necessary to the verification of his deposition, or to the full disclosure of any of the matters into which they are authorised to inquire. If, in either of these cases, the person so summoned shall neglect to attend at the time appointed, having no lawful impediment allowed by the commissioners, these latter may, by warrant, direct him to be apprehended and brought before them to be examined as aforesaid (y). Under these sections it has been held, first, that if a party be summoned to attend the commissioners at a certain place and hour, it is his duty, not only to go to that place at the time appointed, but to wait there until he be examined, or until his attendance be dispensed with ; and, secondly, that, if he disobey a

(y) Compare §§ 24 & 33 ; and see 1 & 2 Will. 4, c. 56, § 16, and 5 & 6 Vict. c. 122, § 2.

summons, directing him to appear at a meeting, and to bring a certain deed with him, he may be legally apprehended on a warrant, authorising the constable to bring him before the commissioners "to be examined as aforesaid, and to produce the said deed;" for although the words employed in the act are simply "to be examined as aforesaid," yet these words by necessary intendment mean, that the party should be compelled by warrant to do all that he was required to do by summons; and therefore, if the summons requires him to produce a document, the warrant should contain a similar requisition (*z*). The commissioners, however, will not be justified in issuing their warrant, unless a reasonable time has intervened between the service of the summons, and the time when the attendance was required (*a*); but it seems that they need not have information on oath of the service of the summons, before they issue their warrant, though, if they take this step, when in fact the summons has not been served, they render themselves liable to an action (*b*).

§ 914. It is not necessary, as in serving writs of subpoena (*c*), that in all cases the *summons* should be *served personally* on the witness; but if it be shown by affidavit, to the satisfaction of the court authorised to act in the prosecution of any fiat in bankruptcy, by which the summons has been issued, that the witness is keeping out of the way, and cannot be personally served, and that due pains have been taken to effect such service, the Court may order, by endorsement upon the summons, that the delivery of a copy to the wife, or servant, or some adult inmate of the house or family of the party, at his usual or last known place of abode or business, and explaining the purport thereof to such wife, servant, or inmate, shall be equivalent to personal service; and the service of such summons in pursuance of such order shall be of the same force and effect as if a copy of the summons had been delivered to the party in person (*d*). The statute 5 & 6 Vict. c. 122, § 79, enacts, that every *warrant* issued by any court authorised to act in

(*z*) *Wright v. Maude*, 10 M. & W. 527; 2 Dowl. N. S. 517, S. C.

(*a*) *Grocock v. Cooper*, 8 B. & C. 211; 2 M. & R. 78, S. C. The question of reasonable time is for the jury, *id.* See *ante*, § 29.

(*b*) *Id.*

(*c*) *Ante*, § 881.

(*d*) 5 & 6 Vict. c. 122, § 80.

the prosecution of fiats in bankruptcy, shall be under the hand and seal of one of the commissioners so acting in such court ; and every *summons* issued by such court shall be in writing under the hand of one of such commissioners.

§ 915. The Act of 6 Geo. 4, c. 16, § 34, enacts, that upon the appearance of any person *summoned* or *brought* before the commissioners by virtue of the powers contained in §§ 24 & 33 (*d*), or if *any person be present at any meeting* of the commissioners, they may examine him upon oath, either by word of mouth, or by interrogatories in writing, concerning the person, trade, dealings, or estate of the bankrupt, or concerning any act of bankruptcy by such bankrupt committed, and may reduce into writing his answers, and such answers so reduced into writing he is required to sign and subscribe ; and if any such person shall refuse to be sworn, or shall refuse to answer any lawful questions put to him by the commissioners touching any of the matters aforesaid, or shall not fully answer to the satisfaction of the commissioners any such questions, or shall refuse to sign and subscribe his examination so reduced into writing, (not having any lawful objection allowed by the commissioners), or shall not produce any books, papers, deeds, writings, and other documents in his custody or power relating to any of the matters aforesaid, which he was required by the commissioners to produce, and to the production of which he shall not state any objection allowed by the commissioners, they may, by warrant, commit him to such prison as they shall think fit, there to remain without bail, until he shall submit himself to be sworn, and full answers make to the[*ir*] satisfaction, to all such lawful questions as shall be put to him, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents as aforesaid in his custody or power, to the production of which no such objection as aforesaid has been allowed. Under this section, the commissioners have no power to commit a witness for refusing to read certain entries in a ledger ; for it is impossible to say that a request to read an entry in a book is, either in form or substance, a question (*e*). So, if a

(*d*) See ante, § 913.

(*e*) *Isaac v. Impey*, 10 B. & C. 442 ; 4 C. & P. 113, S. C.

witness be summoned to produce a deed, and refuse to do so, he cannot be committed for not answering satisfactorily, but the warrant must state that the non-production of the deed was the ground of the commitment (*f*). Still, if a witness refuse to produce his books in order to refresh his memory, and is thereby prevented from answering questions, he may be committed for not answering satisfactorily, such conduct being tantamount to a refusal to answer (*g*). § 37 of the same Act empowers the commissioners to summon the *bankrupt's wife*, and renders her liable, in case of disobedience, to the same penalty as is incurred by other refractory witnesses.

§ 916. The Act of 1 & 2 Will. 4, c. 56, § 7, provides, that *no single commissioner* of the Court of Bankruptcy in London shall have power to commit any bankrupt, or other person examined before him, otherwise than to the custody of a messenger or other officer of the Court, to be by him detained, and brought up before a Subdivision Court, or the Court of Review (*h*), within three days after such commitment; for which purpose one of such courts shall be forthwith assembled, and to which court such examination shall be adjourned. Under this section, coupled with § 6, which lays down how a Subdivision Court is to be constituted, it has been held, that, in order to render a commitment to prison valid, all the three commissioners, who constitute the Court, must be present, though they need not all concur in the sentence of committal (*i*). The reason for this rule is, that, although they should not all vote, their reasoning and arguments might have influence; nay, their very presence might have some weight, for persons often, when alone, do what they would not do in the presence of others (*j*). Moreover, the Subdivision Court will not be authorised in committing a witness on an adjourned examination, after simply asking him whether he abides by his former answers, and whether he wishes to explain them; but he must be re-examined, since the

(*f*) *Ex parte Frowd*, Mon. & M'Ar. 269.

(*g*) *In re Dale*, Mon. & M'Ar. 271, n. (*a*).

(*h*) Now abolished, and the powers of the Court transferred to one of the Vice-Chancellors, by 10 & 11 Vict. c. 102, §§ 1, 2.

(*i*) *In Re Smith*, Mon. & B. 418.

(*j*) *Ex parte Sampson*, 1 Mon. & Ayr. 245, 255.

commissioners have no right to form their judgment upon answers given in their absence to questions put in their absence (*k*).

§ 917. The Stat. 5 & 6 Vict., c. 122, § 85, enacts, that the several courts authorised to act in the prosecution of fiats in bankruptcy by the Act of 1 & 2 Will. 4, c. 56, or by that Act, shall be auxiliary to each other for proof of debts and for the examination of witnesses on oath, or for either of such purposes; and the Court so acting as auxiliary in the examination of witnesses, shall possess the same powers to compel the attendance of, and to examine, witnesses, and to enforce obedience to such examination, and the production of books, deeds, papers, writings, and other documents, as are possessed by the Court to which such fiat is directed; provided that all such examinations of witnesses shall be taken down in writing, and shall be annexed to and form part of the proceedings under such fiat, and that no such proof of debts and examination of witnesses in the prosecution of any fiat, shall be taken by any such auxiliary court without the permission in writing of the Court to which such fiat is directed (*l*). The Act of 6 Geo. 4, c. 16, § 35, provides generally, that where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the commissioners, every such person shall have such costs and charges as the commissioners in their discretion shall think fit; and every witness summoned to attend before the commissioners, shall have his necessary expenses tendered to him, in like manner as is now by law required, upon service of a subpoena to a witness in an action at law.

§ 918. The mode of summoning witnesses before the court for the relief of *insolvent debtors*, is mainly regulated by § 27 of

(*k*) *Ex parte* Bardwell, 1 Mon. & Ayr. 193, 211.

(*l*) § 86 enacts, that the Lord Chancellor may authorise any commissioner, &c. of the court in London to act for or in aid of any country commissioner, as deputy registrar, and vice versa; or any commissioner or deputy registrar of one district to act in any other district; and such person so acting as aforesaid shall have all the power, jurisdiction, and authority, and perform all the duties of the commissioner, or deputy registrar, for or in aid of whom he shall so act.

1 & 2 Vict., c. 110, which enacts, among other things, that the Court or any commissioner thereof acting under the powers of that Act, may administer oaths, and examine all parties and witnesses upon oath for the purposes of that Act, and shall have the same powers of compelling the attendance of witnesses both before the Court and before any acting commissioner thereof, and before an officer of the Court or examiner as hereinafter mentioned (*m*), and before such justices as are hereinafter mentioned (*n*), and of requiring and compelling the production of books and writings, as are possessed by any of the superior courts at Westminster (*o*); and may order any prisoner who shall be a necessary and material witness in any matter pending in the court, to be brought before the Court or commissioner, or officer, or examiner, or justices, as often as shall be requisite; and that the Court, or any acting commissioner thereof, shall have the power of committing all persons guilty of any contempt of the Court to the Queen's prison (*p*), or to the common gaol of any county in which such person shall be, or shall usually reside: Provided, that nothing therein contained shall extend to the compelling the attendance of any witness, unless the party, on whose behalf such witness shall be required to attend, shall have previously tendered to such witness such allowance for expenses for his attendance, as in the judgment of the Court or of a commissioner thereof shall appear to be reasonable. § 66, after re-enacting that, in case any assignee or *other person* shall disobey any rule or order of the Court duly made for enforcing the purposes and provisions of that Act, the Court may order the person so offending to be arrested and committed as for contempt to the Queen's prison (*q*), or to the common gaol of any county, city, or place, where he shall be or usually reside, there to remain without bail until he shall fulfil the duty required, or until the Court shall make order to the contrary:—provides, that nothing therein contained shall authorise a commissioner of the Court acting

(*m*) As to their powers, see §§ 62, 63, 74 of the Act.

(*n*) As to their powers, see §§ 70, 72, et seq., of the Act.

(*o*) The process used is a writ of subpoena, purporting to be witnessed by the chief commissioner of the Insolvent Debtors' Court, and actually signed by the clerk of that court. It resembles the ordinary subpoena.

(*p*) 5 & 6 Vict. c. 22.

(*q*) *id.*

out of court upon summons to commit any person for disobedience of any order of the Court, or of any commissioner thereof. § 107 enacts, that the justices mentioned in the Act shall have the same powers of compelling the attendance of witnesses, and of requiring and compelling the production of books, papers, and writings for the purposes of the Act, as are given to the Court and the commissioners, subject to such provisions and limitations as the same are made subject to; and in all cases where the duplicate of any petition and schedule shall have been lodged with the clerk of the peace or his deputy, or with the town-clerk or other officer in the manner mentioned in § 106, such clerk of the peace or his deputy, or such town-clerk or other officer, is thereby authorised to issue all such subpoenas under the Act as may be requisite, in each of which the names of not more than four persons shall be inserted, and to receive for such subpoena from the person requiring the same, the sum of two shillings and sixpence, and no more.

§ 919. Besides the above powers, the commissioners of the court for the relief of insolvent debtors, have now, by virtue of the recent Act of 10 & 11 Vict., c. 102 (*r*), like powers for enforcing the attendance of witnesses, in all matters of insolvency and debt under the Acts of 5 & 6 Vict., c. 116, 7 & 8 Vict., c. 96, and 8 & 9 Vict., c. 127, as were formerly exercised by the commissioners of bankrupts under the same Acts (*s*); provided the debtor or defendant

(*r*) See §§ 4, 6, 8.

(*s*) As to these, see 7 & 8 Vict. c. 96, which, amending the Act of 5 & 6 Vict. c. 116, empowers parties not subject to the bankrupt laws to petition for protection from process; and then enacts, in § 5, that upon such petition being filed, the commissioner shall possess the like power and authority to compel the attendance of, and to examine, such petitioner and his wife, and every person known or suspected to have any of the property of such petitioner in his possession, or who is supposed to be indebted to such petitioner, and every person whom the commissioner believes capable of giving any information concerning the person, trade, business, calling, dealings, or property of such petitioner, or any information material to the full disclosure of the dealings of such petitioner, and to enforce both obedience to such examination, and the production of books, deeds, papers, writings, and other documents, as by any law now in force relating to bankrupts are possessed by the several courts authorised to act in the prosecution of fiats in bankruptcy touching the seizure of property, and the examination of any bankrupt or other person under a fiat in bankruptcy. See also § 53 of the same Act. See further 8 & 9 Vict. c. 127, which is an Act for better securing the payment of small debts, and

shall have resided for the last six months within twenty miles of the London Post-office.

§ 920. The mode of compelling witnesses to attend before the newly-established *County Courts* for the recovery of small debts, is mainly regulated by the Act of 9 & 10 Vict., c. 95, which after enacting in § 85, "that either of the parties to the suit or any other proceeding under this Act may obtain, at the office of the clerk of the court, summonses to witnesses, to be served by one of the bailiffs of the Court, with or without a clause requiring the production of books, deeds, papers, and writings in their possession or control;" and that, "in any such summons any number of names may be inserted;" goes on to provide, by § 86, "that every person on whom any such summons shall have been served, either personally or in such other manner as shall be directed by the general rules or practice of the courts, and to whom, at the same time, payment or a tender of payment of his expenses shall have been made, on such scale of allowance as shall be from time to time settled by the general rules of practice of the Court, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be

which enacts, in § 18, "that either of the parties to the suit or any other proceeding before any such commissioner or in any such court may obtain summonses to witnesses, to be served by a messenger or bailiff, with or without a clause requiring the production of books and writings in their possession or control; and in any such summons any number of names may be inserted; and every person on whom any such summons shall be personally served within the jurisdiction of the Court, and to whom at the same time payment or tender of his expenses shall have been made, on such scale of allowance as shall be from time to time settled by the Court of Bankruptcy or judge of any such court as aforesaid, as the case may be, with the approval of one of Her Majesty's principal Secretaries of State, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books or writings required by such summons to be produced; and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn or give evidence, shall forfeit and pay such fine, not exceeding five pounds, as the commissioner or judge shall set on him; and payment of such fine shall be enforced in like manner as payment of any debt recovered by judgment of any court of competent jurisdiction; and the whole or any part of such fine in the discretion of the judge, after deducting the costs, shall be applicable toward indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be applicable to the expenses of the court in which the fine was imposed."

produced; and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine, not exceeding *ten pounds*, as the judge shall set on him; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable toward indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the general fund of the court in which the fine was imposed." The Act contains no provision respecting witnesses who live beyond the jurisdiction of the Court, and their attendance, it would seem, can only be enforced, if at all, by a Crown Office subpoena.

§ 921. The County Courts, like the Insolvent Debtors' Court, have also now jurisdiction in certain cases of insolvency and debt, which were formerly under the jurisdiction of the courts of bankruptcy; and in these cases they may exercise such powers for enforcing the attendance of witnesses as were heretofore exercised by the commissioners of bankrupts (*t*).

§ 922. By the Act of 6 & 7 Vict., c. 18, §§ 35, 50, and 51, *revising barristers* are empowered to require, by summons under their hands, the attendance of assessors, overseers, and relieving and other parish officers, who, in the event of their disobedience, are liable, upon proof of the service of the summons, to be fined by the barristers any sum not exceeding five pounds, nor less than twenty shillings.

§ 923. The attendance of witnesses before *arbitrators* is regulated in England by §§ 39 and 40 of 3 & 4 Will. 4, c. 42, and in Ireland, by §§ 63 and 64 of 3 & 4 Vict., c. 105; which sections respectively enact, that, where any reference shall have been made by any rule of court, or judge's order, or order of *Nisi Prius* in any action, or by any submission to reference containing an agreement that it shall be made a rule of court, the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or any judge, may, by rule or order, command the

(*t*) 10 & 11 Vict. c. 102, §§ 4, 6, 8. See ante, § 919.

attendance and examination of any person, or the production of any documents, mentioned therein; and the disobedience of such rule or order shall be deemed a contempt of court, if, in addition to the service of the same, an appointment of the time and place of attendance, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with, or after the service of, such rule or order: Provided that every person whose attendance is required, shall be entitled to the like conduct-money, and payment of expenses, and for loss of time, as upon attendance at any trial; that the application made to the Court or judge for such rule or order, shall set forth the county where the witness is residing at the time, or satisfy the Court or judge that he cannot be found; and that no person shall be compelled to produce, under any such rule or order, any writing or other document that he might have withheld at a trial, or to attend on more than two consecutive days, to be named in the order.

§ 924. The Act of 1 & 2 Will. 4, c. 56, § 48, enacts, that if the assignees of any bankrupt's estate shall agree to refer any matter in dispute with any party to arbitration, in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the Court of Bankruptcy; and thereupon all such rights and remedies, duties and liabilities, shall accrue from such reference so made a rule of the said court, in respect to arbitration and award, and non-performance of such award, and otherwise howsoever, as by law at present accrue, upon any submission of reference made a rule of any other court of record. Under the Act to encourage the establishment of district courts and prisons, certain disputes may be referred to arbitration, and in that event, the arbitrator is empowered to summon before him such persons as he may require, and to examine them upon oath (u). So, official referees, under the Metropolitan Buildings' Act, may, by their summons in writing, sealed with the seal of the registrar of metropolitan buildings, require the attendance of any person to give evidence and to produce documents; and in the

(u) 5 & 6 Vict. c. 53, § 32.

event of disobedience, the party may be proceeded against as for a contempt of court, provided he has been paid or tendered his expenses, and has been served, in addition to the summons, with an appointment of the time and place of attendance, signed by at least one of the referees (*x*).

§ 925. It has been stated in a former part of this work (*y*), that under the provisions of the Acts of 13 Geo. 3, c. 63, 1 & 2 Will. 4, c. 22, and 3 & 4 Vict. c. 105, § 66, the judges at Westminster and Dublin respectively are authorised to grant *writs of mandamus* or *commissions* to the judges of India, of the colonies, and of other places under her Majesty's dominion, empowering them to examine witnesses in certain cases; and § 2 of the second named, and § 67 of the last named Act, respectively provide, that whenever any such writ or commission shall issue, "the judge or judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the Court, whereof they are judges, does or may possess for that purpose in causes or suits depending in such court." So, we have seen (*z*), that each of the Superior Courts at Westminster, the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham, and the several judges thereof, may, under § 4 of 1 & 2 Will. 4, c. 22, and each of the Superior Courts at Dublin, and the several judges thereof, may, under § 69 of 3 & 4 Vict. c. 105, order witnesses within the jurisdiction of the court wherein an action shall be depending, to be examined on interrogatories before the Master of the court, or such other person as shall be appointed; and § 5 of the former, and § 70 of the latter Act, provide, that when any rule or order shall be made for this purpose, "it shall be lawful for the Court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order; and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient

(*x*) 7 & 8 Vict. c. 84, § 85.

(*y*) Ante, §§ 359—367.

(*z*) Ante, § 364.

so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had by attachment, (the judge's order being made a rule of court before or at the time of the application for the attachment,) if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service of such rule or order: Provided always, that every person, whose attendance shall be so required, shall be entitled to the like conduct-money, and payment for expenses, and loss of time, as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document, that he would not be compellable to produce at a trial of the cause." § 7 of the one Act, and § 72 of the other, require that the examination of witnesses shall be taken on oath or affirmation, to be administered, either by the examiner, or by a judge of the Court wherein the action shall be depending; and adds the usual clause, that witnesses giving false evidence shall be guilty of perjury; while §§ 8, and 73, respectively require the examiner "to make, if need be, a special report to the Court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the Court is authorised to institute such proceedings, and make such orders upon the report as justice may require, and as may be instituted and made in any case of contempt of the Court"(a).

§ 926. The Act (b) of 7 & 8 Vict. c. 101 contains a clause of much importance, as regulating, in a large class of cases, the mode of enforcing the attendance of witnesses before *justices of the peace*. § 70 of that statute enacts, "that, in any proceedings to be had before justices in petty or special sessions,

(a) § 11 provides, that no order shall be made in pursuance of this Act by a single judge of the Court of Pleas at Durham, unless he be also a judge of one of the Courts at Westminster.

(b) Qu. whether justices can enforce the production of documents under this Act. See *R. v. Orton*, 7 Q. B. 120, 124.

or out of sessions, under the provisions of that Act, or of any of the Acts required to be construed as one Act therewith (c),” (that is, 5 & 6 Vict. c. 57; 4 & 5 Will. 4, c. 76; 5 & 6 Will. 4, c. 69; 6 & 7 Will. 4, c. 96; 1 & 2 Vict. c. 56, §§ 118—122; 1 & 2 Vict. c. 25, § 2; 7 Will. 4 & 1 Vict. c. 50; and 2 & 3 Vict. c. 84, except so far as the provisions of any former Act shall have been expressly altered or amended by the provisions of any subsequent Act), “if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice to *summon* such person to appear, and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person, and that the reasonable expenses of attendance were paid or tendered to such person, it shall be lawful for such justice, by *warrant* under his hand and seal, to require such person to be brought before him, or any justice before whom such proceedings are to be had; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined; and in case of such submission the order of any such justice shall be a sufficient warrant for the discharge of such person.”

§ 927. Many other Acts empower justices in particular inquiries to compel the attendance of witnesses by *summons and warrant*; as for instance, one of the Acts which regulate the business of pawn-brokers (*d*), the Acts relating to factories (*e*), the Act regulating the labour of children, young persons, and women, in print-

(c) § 74; 5 & 6 Vict. c. 57, § 18.

(d) 30 Geo. 2, c. 24, § 16.

(e) 7 & 8 Vict. c. 15, § 49; 3 & 4 Will. 4, c. 103, § 38. By § 50 of the first named Act, inspectors and sub-inspectors may summon witnesses, the form of the summons being given in Sched. (D).

works (*f*), the Act relating to illegal combinations of manufacturers or workmen (*g*), the Act prohibiting the payment of wages in goods (*h*), the Act relating to bread (*i*), and the Act for the more speedy trial and punishment of juvenile offenders (*j*).

§ 928. Other statutes again, while they authorise the justices to *summon* the witness, give them *no power to issue a warrant*, but enable them to punish disobedience by the infliction of a *fine*. Thus, the recent Act for regulating joint-stock companies enacts, that, in all cases in which any penalty or forfeiture, or any costs or expenses are recoverable before two justices of the peace under that Act, it shall be lawful for any one justice, to whom complaint shall be made of any such offence, to summon the party complained of, and the witnesses on each side, before any two justices; and if any witness, so summoned, shall neglect or refuse to appear at the time and place appointed, without a reasonable excuse for such neglect or refusal, to be allowed by the justices, or appearing shall refuse to be examined on oath and give evidence before such justices, then every such person shall forfeit for every such offence a sum not exceeding five pounds (*k*). So, under the Companies, the Lands, and the Railways, Clauses Consolidation Acts, witnesses disobeying the summons of a justice, after having been paid or tendered their expenses, or refusing to be examined upon oath, or to give evidence, are liable to a penalty not exceeding five pounds (*l*). So, under the Highway Act, any witness, who after being paid or tendered his reasonable expenses, shall be summoned to attend before the justices to give evidence touching any offence under that Act, whether on behalf of the prosecutor or the accused, shall forfeit a like sum not exceeding five pounds, if he disobey

(*f*) 8 & 9 Vict. c. 29, §§ 36, 37.

(*g*) 6 Geo. 4, c. 129, § 8. Under this section the refractory witness may be committed to gaol for three calendar months.

(*h*) 1 & 2 Will. 4, c. 37, § 11, under which the witness who disobeys the summons, or otherwise misbehaves, may be committed for any term not exceeding fourteen days.

(*i*) 6 & 7 Will. 4, c. 37, § 25. Witness liable to same punishment as in last note.

(*j*) 10 & 11 Vict. c. 82, § 7.

(*k*) 7 & 8 Vict. c. 110, §§ 71, 72.

(*l*) 8 & 9 Vict. c. 16, § 155; *id.* c. 18, § 143; *id.* c. 20, § 153.

the summons, or refuse to be examined upon oath and to give evidence (*l*). A similar clause is inserted in the Turnpike Act, excepting only that the penalty for disobedience cannot exceed forty shillings (*m*);—in the Acts relative to the Game Laws, in one of which the penalty may amount to ten pounds (*n*), while in another it cannot exceed five pounds (*o*);—in the Act governing the collection of the revenue of excise (*p*), where the penalty of disobeying a summons, whether issued by justices of the peace, commissioners of excise, or commissioners of appeal, is fixed at fifty pounds;—in the Act relating to the trade of tanners (*q*), where the penalty is forty shillings;—in the Acts relating to the embezzlement of public stores (*r*), and to newspapers (*s*), in both of which the penalty is ten pounds;—in the Acts relating to tickets of work in the hosiery and silk-weaving trades, in the former of which the maximum penalty is two pounds, and in the latter five pounds (*t*);—and in numerous other statutes (*u*), which our limits will not allow us to specify.

§ 929. A third class of statutes, while directing justices to hear and determine certain disputes and charges, are *silent* as to the *mode of compelling witnesses* to attend before them (*x*); and in these cases, though the ordinary course is to *summon* the persons, whose testimony appears to be material, and who do not voluntarily attend, yet serious doubts have been entertained, whether, in the

(*l*) 5 & 6 Will. 4, c. 50, § 102.

(*m*) 3 Geo. 4, c. 128, § 138; 4 Geo. 4, c. 95, § 88.

(*n*) 52 Geo. 3, c. 93, Sched. (L), § 14. This Act authorises commissioners of taxes and justices to convict parties of sporting, &c., without a certificate, see Sched. (L) §§ 12 & 13. Under these sections, the justice and commissioner must summon the accused and the witnesses to appear before *himself*; since no other justice is authorised to hear the matter, except the one to whom the information or complaint is made. *Jones v. Gurdon*, 2 Q. B. 600.

(*o*) 1 & 2 Will. 4, c. 32, § 40.

(*p*) 7 & 8 Geo. 4, c. 53, § 74.

(*q*) 41 Geo. 3, c. 53, § 10.

(*r*) 39 & 40 Geo. 3, c. 89, § 23.

(*s*) 6 & 7 Will. 4, c. 76, § 30. § 31 provides that it will be sufficient service of the summons to leave it at the last known place of abode of the witness.

(*t*) 8 & 9 Vict. c. 77, §§ 5, 6; 8 & 9 Vict. c. 128, §§ 4, 5.

(*u*) See 36 Geo. 3, c. 60, § 13, which relates to metal buttons; and 6 & 7 Vict. c. 86, § 42, which regulates hackney-coaches in London.

(*x*) See 4 Geo. 4, c. 34, which relates to complaints between masters and servants; 4 & 5 Will. 4, c. 35, and 3 & 4 Vict. c. 85, which relate to chimney-sweepers; and 6 & 7 Vict. c. 40, which relates to the manufacture of wool.

event of their disobedience, the justices have at common law any power to issue a warrant for their apprehension (*x*). If, indeed, the investigation relate to a charge of *felony* or *misdemeanor*, it seems pretty clear that the justices may exercise this power; for although it is not expressly recognised, either by the Act of 7 Geo. 4, c. 64 (*y*), or by the justices' commission, it appears to follow as a necessary consequence from the authority given to committing magistrates, to bind over by recognisance all persons, who know anything material touching such offences, to appear at the trial (*z*). There is much sound sense in the old legal maxim, *Concesso uno aliquo, etiam id concedi videtur, sine quo prius concessum haberi nequit* (*a*). Still the warrant must be confined to the simple purpose of directing the constable to bring the refractory witness before the justice, in order to give his testimony; and therefore, where it commanded that the witness should be brought up to find sufficient bail to appear and give evidence at the next assizes, it was held that the justice had exceeded his powers, and that the warrant was bad (*b*).

§ 930. In all other cases, where the inquiry does not relate to a charge of felony or misdemeanor, and where no express powers are given by statute, the most prudent course for the justices to adopt, is to summon the witness in the first instance, and if he refuse to attend, to direct that he shall be served with a subpoena, which may be obtained from the Clerk of the Peace, if the witness lives within the jurisdiction of the justices, or from the Crown Office, if he resides in another county (*c*). Indeed, notwith-

(*x*) See 2 Burn's Just., by Chitty, 447. Dickinson's Quart. Sess. 127.

(*y*) The corresponding Irish Act 9 Geo. 4, c. 54, § 2 expressly authorises "the justice to summon any person within his jurisdiction, whom he shall have reason to consider capable of giving material evidence concerning any felony or suspicion of felony, and to examine such person on oath touching the same;" but this clause is omitted in § 3, which relates to misdemeanors, and § 2, which enables the justice to commit any witness to gaol, who shall refuse to submit to the examination, or to enter into the recognizances, is silent as to the course to be pursued, if the witness refuses to attend pursuant to the summons.

(*z*) *Evans v. Rees*, 12 A. & E. 59, per Lord Denman.

(*a*) Dalt. Just. p. 441, ed. 1697, c. 169, § 6. See also *id.* p. 24, c. 6.

(*b*) *Evans v. Rees*, 12 A. & E. 55; 4 P. & D. 32, S. C.

(*c*) See *R. v. Lydeard St. Lawrence*, 11 A. & E. 627, per Lord Denman; *R. v. Greenaway*, and *R. v. Carey*, 7 Q. B. 126. It deserves notice, that by

standing the general language of the Acts, which empower justices to compel the attendance of witnesses by summons and warrant, it is clear that they can only exercise this power within the limits of their own jurisdiction; and, therefore, whenever the witness lives beyond such limits, recourse must be had to the Crown Office subpoena, except in the very few instances, where, as in the Acts relating to the excise (*c*), and to the trade of tanners (*d*), power is expressly given to the justices to issue process beyond their jurisdiction.

§ 931. A somewhat important provision of the Irish Statute, 1 & 2 Will. 4, c. 44, may here be mentioned. § 8 enacts, that it shall be lawful for every court in Ireland, having by law jurisdiction over criminal offences, upon proof being made of the service, either personally, or at the residence of the person required to attend, of any summons to appear and give evidence in such court touching any offence, to impose upon the person so served, in case of his disobeying such summons, such fine as the Court shall in its discretion think proper.

§ 932. Several Acts of Parliament give to commissioners, inspectors, sheriffs, and other officers, more or less stringent powers to enforce the attendance of witnesses before them. Thus, the *Poor Law Commissioners*, both for England and Ireland, and the inspectors respectively appointed by them, may summon any person for the purpose of being examined upon any matter under their control, or of producing or verifying any documents relating to such matter; and in the event of such person disobeying such summons,

15 Geo. 3, c. 39, any justice is empowered to administer an oath to any person, when any statute directs a penalty to be levied, or a distress to be made, provided such justice be acting under the authority of such statute; and, possibly, this enactment might be held, by implication, to empower the justice to enforce the attendance of all material witnesses by summons and warrant. *Sed qu.*

(*c*) 7 & 8 Geo. 4, c. 53, § 74, empowers the commissioners of excise, the justices, and commissioners of appeal, to summon any witness, "in whatever part of the United Kingdom he may reside or be."

(*d*) 41 Geo. 3, c. 53, § 10, enables justices to summon witnesses, "although such persons shall not at the time of such summons be within the jurisdiction of such justices," "provided, that no person shall be obliged to travel by reason of such summons more than six miles."

or refusing to give evidence, or wilfully altering, suppressing, concealing, destroying, or refusing to produce any such document, he shall be deemed guilty of misdemeanor: Provided always, that no person shall be required to travel more than ten miles in England, or twenty miles in Ireland, from his place of abode; and if he be summoned by an English inspector, he shall be allowed his expenses (*e*). So, the *Inclosure Commissioners*, or any assistant-commissioner, may, by summons under the seal of the Commission, or under the hand of such assistant-commissioner, require the attendance of witnesses before themselves, or if the summons be under seal, before the valuer; and every such witness, in case of disobedience, or other misconduct in refusing to be sworn or to give evidence, is liable to a penalty not exceeding ten pounds, to be levied and recovered before two justices of the county in which the land to be inclosed is situate; and will also be deemed guilty of misdemeanor; but the witness must be paid or tendered the reasonable charges of his attendance, and need not travel above ten miles from the place of his abode (*f*). So, when landowners refuse to treat with commissioners of sewers, these last may issue their warrants to the sheriff to impanel a compensation jury to attend the sessions; and, thereupon, the Clerk of the Peace, or his deputy, shall summon all such persons as shall be thought necessary to be examined as witnesses, who, if they do not appear, or if they refuse to be sworn or to be examined, without lawful excuse to be allowed by the sessions, shall forfeit a sum not exceeding five pounds for every such offence (*g*). So, in the late Act to enable the Crown to acquire lands for naval purposes, if parties refuse to treat with the commissioners thereby appointed, the sheriff, under-sheriff, or sheriff-depute, as in the last case, may summon a compensation jury to attend before him; and such officer, instead of the Clerk of the Peace, is further authorised to summon the witnesses, who, if they disobey, &c., are liable to a penalty not

(*e*) 10 & 11 Vict. c. 109, §§ 11, 21, 26; 4 & 5 Will. 4, c. 76, §§ 13, 14; 10 & 11 Vict. c. 90, §§ 19, 20, 1r.

(*f*) 8 & 9 Vict. c. 118, §§ 9, 39, 40, 159, 164. See also 41 Geo. 3, c. 109, §§ 33, 34.

(*g*) 3 & 4 Will. 4, c. 22, §§ 26, 27. § 29 provides by whom the costs of the witnesses are to be paid. See 4 & 5 Vict. c. 45, §§ 13, 14.

exceeding fifty pounds, to be imposed by some justice on proof of the offence (h).

§ 933. Again, where *commissioners* are appointed under the Act of 42 Geo. 3, c. 106, to take evidence in Ireland respecting *Irish controverted elections*, the chairman of the commission is empowered, at all times, by warrant under his hand and seal, to send for all persons, papers, and records; and the commissioners may examine the witnesses on oath, and exercise the same powers as are enjoyed by select committees of the House of Commons in controverted elections (i). § 28 authorises the chairman, "by warrant under his hand and seal, directed to any one or more constable or constables, or to any other person or persons specially appointed by such chairman, to summon and require the attendance of any witnesses or other persons before the commissioners, at the day and place to be mentioned in the warrant;" while § 29 enacts, "that if any person so summoned as a witness shall neglect or refuse to attend, without lawful excuse, to be determined by the said commissioners,—or if any witness before such commissioners shall prevaricate, or shall otherwise misbehave in giving or refusing to give evidence,—or if any person shall be guilty of any contempt or misbehaviour whatsoever of or towards the said commissioners, while sitting and acting in the execution of their said commission, the said chairman of the said commissioners shall, and he is hereby empowered, by a warrant under his hand and seal, and directed to the gaoler of the common gaol of the county or place in which the said commissioners shall sit, to commit such person (not being a Peer of the realm or a Lord of Parliament) to the custody of the said gaoler, without bail or mainprize, for any time not exceeding six calendar months." § 30 enacts, "that in case it shall be requisite to summon any member of Parliament to give evidence before the said commissioners, who shall be then attending his duty in Parliament, the chairman of the commissioners shall certify the same to the Speaker

(h) 6 & 7 Vict. c. 58, §§ 8, 13.

(i) § 23. See ante, § 907.

of the House of Commons, who shall report the same to the House" (k).

§ 934. It seems that, except under the Act of 1 & 2 Will. 4, c. 22, § 4, which has already been alluded to (l), no witness can be compelled to give evidence before a *Master of the Common-law Courts*; at least such Courts have no power to interfere (m).

§ 935. It were an easy task to expand to a tenfold length the foregoing summary of the statutes regulating the attendance of witnesses; but it is hoped that what has already been said will, in some measure, serve two important purposes. First, it will furnish something like a guide to the practitioner, in ordinary cases, where witnesses are required to be examined; secondly, it may suggest the expediency of amending the existing law to those who are able and willing to effect the necessary change. No man, we are persuaded, can arise from contemplating the infinite variety of forms of proceeding, which must now be resorted to by all inferior courts and functionaries, in order to enforce the attendance of witnesses, without feeling how great would be the advantage to the country, if the Legislature would pass, as they easily might do, some general Act, which should render the practice on these points clear, simple, and uniform.

§ 936. In order to encourage witnesses to come forward voluntarily, they, as well as parties, barristers, attorneys, and, in short, all persons who have that relation to a suit which calls for their attendance, are *protected from arrest*, while going to the place of trial, while attending there for the purposes of the cause, and while returning home; *cundo, morando, et redeundo* (n).

(k) See further as to commissioners empowered to try official persons who have been guilty of offences in India, 24 Geo. 3, c. 25, §§ 74, 75; 26 Geo. 3, c. 57; as to examiners appointed to take depositions *de bene esse* under the provisions of 24 Geo. 3, c. 25, § 81; and 42 Geo. 3, c. 85, § 3; and as to commissioners appointed under the Act for regulating the care and treatment of lunatics, 8 & 9 Vict. c. 100, §§ 100, 101.

(l) Ante, § 925.

(m) *M'Dougall v. Nicholls*, 4 Dowl. 76, per Coleridge, J.

(n) *Meekins v. Smith*, 1 H. Bl. 636; *Walpole v. Alexander*, 3 Doug. 45. In *Ex parte Britten*, 1 Mon. D. & D. 278, the husband of a petitioner, who accompa-

The service of a subpoena or other process is not necessary in order to afford the witness this protection, provided he has consented to come without such service (*o*), and actually does attend in good faith (*p*); and, therefore, the privilege extends to a witness coming from abroad without a subpoena (*q*). In determining what constitutes a reasonable time for going, staying, and returning, the Courts are disposed to be liberal; and provided it substantially appears that there has been no improper loitering or deviation from the way, they will not strictly inquire whether the witness or other privileged party, went as quickly as possible and by the nearest route (*r*). Thus the rule of protection has been held to apply, where a witness, two hours after he had left the court, was arrested about a mile off in the direct road to his house (*s*); where a defendant, who had attended his cause in the morning, went to a tavern near the court in the afternoon, to dine with his attorney and witnesses (*t*); where a party had been staying for some days at a coffee-house near the court, waiting for the trial of his cause, which was a remanet, but was not in the list of causes for the day on which the arrest happened (*u*); where a party attending an arbitration was arrested during an adjournment of the reference from one period to another of the same day (*x*); where a witness, in a cause tried on Friday afternoon, was arrested in the assize town on Saturday evening, as she was entering a stage coach which

nied his wife to the Court of Review to attend the hearing of the petition, was held to be privileged from arrest; since, being liable to the costs of the application, he had such a relation to the suit as fully justified his attendance.

(*o*) *Arding v. Flower*, 8 T. R. 536, per Lord Kenyon; *Ex parte Byne*, 1 Ves. & B. 320; *Rishton v. Nisbett*, 1 M. & Rob. 347, per Alderson and Taunton, Js. But see *Magnay v. Burt*, 5 Q. B. 393, where Tindal, C. J., observed, that the privilege had been disallowed, where the party attended as a volunteer, and not upon process. See also *Salk*. 544.

(*p*) *Meekins v. Smith*, 1 H. Bl. 637; *Walpole v. Alexander*, 3 Doug. 46, per Lord Mansfield.

(*q*) *Walpole v. Alexander*, 3 Doug. 45; *Norris v. Beach*, 2 Johns. 294.

(*r*) *Strong v. Dickenson*, 1 M. & W. 491, per Lord Abinger; *Ricketts v. Gurney*, 7 Price, 704, per Graham, B.; *Willingham v. Matthews*, 6 Taunt. 358; 2 Marsh. 57, S. C.; *In re McKone*, Ir. Cir. R. 65; *Smythe v. Banks*, 4 Dall. 329.

(*s*) *Selby v. Hills*, 8 Bing. 166. See *Ex parte Clarke*, 2 Dea. & C. 99.

(*t*) *Lightfoot v. Cameron*, 2 W. Bl. 1113.

(*u*) *Childerston v. Barrett*, 11 East, 439; *Hurst's case*, 4 Dall. 387.

(*x*) *Ex parte Temple*, 2 Ves. & B. 395; *Ex parte Russell*, 1 Rose, 278.

was to convey her home (*y*); where a plaintiff, on leaving court, called at his office for refreshment, and then on his way home went to his tailor's, in whose shop he was arrested (*z*); and even where a witness from abroad, on finding that the trial was postponed till the next sittings, determined to wait till it came on, and was arrested on the eighth day after his arrival (*a*).

§ 937. On the other hand, where a witness, subpoenaed out of Chancery, was arrested three days before the time fixed for his examination, while going to his attorney's office to look at the interrogatories which he would be called upon to answer (*b*); where a party, having come from the country to town to attend an arbitration, remained, after an adjournment of the reference sine die, till the expiration of the fourth day of an approaching term, in expectation of a motion being made by the opposite party relative to the order of reference (*c*); and where an attorney, having been arrested during the afternoon at the Auction Mart Coffee House, swore that, having professional business in several causes at Westminster, he went into the City in his way to the courts, but omitted to state either where his house was, or when he left home (*d*);—in all these cases the Courts have refused to discharge the party out of custody. So, though it seems that a witness who comes to town to be examined, is protected from arrest during the whole time that he *bonâ fide* remains there for the purpose of giving evidence (*e*), a witness living in London is not protected in the interval between the service of the subpoena and the day appointed for his examination (*f*). Neither can the privilege from arrest be prolonged, in consequence of the party's

(*y*) *Holiday v. Pitt*, 2 Str. 986; Gilb. R. 308. "There she was directly on her way home. The Court did not decide that she might not have been arrested at the assize town on Saturday morning." Per Alderson, B., in *Strong v. Dickenson*, 1 M. & W. 490.

(*z*) *Pitt v. Coomes*, 5 B. & Ad. 1078; 3 N. & M. 212, S. C.; *Luntly v. —*, 1 Cr. & M. 579; *Ahearne v. M'Guire*, 2 Ir. Eq. R. 437; *Mahon v. Mahon*, id. 440.

(*a*) *Walpole v. Alexander*, 3 Doug. 45.

(*b*) *Gibbs v. Phillipson*, 1 Russ. & Myl. 19.

(*c*) *Spencer v. Newton*, 6 A. & E. 623; 1 N. & P. 818, S. C.

(*d*) *Strong v. Dickenson*, 1 M. & W. 488.

(*e*) *Gibbs v. Phillipson*, 1 Russ. & Myl. 19.

(*f*) *Id.*

inability to return home for want of pecuniary means (*g*), though, possibly, if the detention has been caused by illness, the Court will consider this circumstance in fixing the extent of the protection (*h*). In one case, where a party in London, being summoned to attend a reference at Exeter, went, three days before the time of meeting, with his attorney to Clifton where his wife lived, to examine documents necessary to be produced before the arbitrator, and was arrested on the second day before he had completed the arrangement of his papers, the Courts of King's Bench and Exchequer pronounced opposite decisions, the former holding that he was not, the latter that he was, privileged from arrest (*i*).

§ 938. It would seem that in general this protection extends only to persons arrested on *civil process*, for against criminal process home itself is no protection (*k*) ; though in Ireland, where a witness for the Crown, attending at the Quarter Sessions, was arrested under a writ of commission of rebellion, the Court out of which the process issued, while declining to express any opinion as to whether this writ was in the nature of a criminal proceeding, discharged the witness from custody, and observed that it was highly essential to the interests of the public, that witnesses in criminal courts of justice should be protected and encouraged (*l*). A witness is not privileged from being taken by his bail, even during his attendance at court, for this is not an arrest, but a retaking (*m*).

§ 939. This privilege, so far as parties and witnesses are concerned, will be recognised in all cases where the attendance is

(*g*) *Spencer v. Newton*, 6 A. & E. 623 ; 1 N. & P. 818, S. C. (*h*) *Id.*

(*i*) *Randall v. Gurney*, 3 B. & A. 252, Abbott, C. J., diss. ; *Ricketts v. Gurney*, 7 Price, 699, per Graham and Wood, Bs., Garrow, B., diss.

(*k*) Per Lord Denman, *In re Douglas*, 3 Q. B. 837, 838. It was there held that a warrant, issued upon an information ex officio, under the Act of 33 Geo. 3, c. 52, § 62, and expressed to be to answer for certain misdemeanors whereof the party was impeached, and also for certain penalties sued for by the Att.-Gen., was criminal process, under which the party might be taken redeundo after his discharge from illegal custody.

(*l*) *Graves v. McCarthy*, 1 Cr. & Dix, Abr. Ca. 127.

(*m*) *Ex parte Lyne*, 3 Stark. R. 132, per Abbott, C. J. ; *Horn v. Swinford*, 1 D. & R. Mag. Ca. 361, per Richards, C. B.

given in any matter pending before a *lawful tribunal* having jurisdiction of the cause. Thus it has been extended to parties and witnesses attending before an arbitrator, whether he be appointed by an order of the Court of Chancery (*r*), a rule of one of the common-law courts, a judge's order, an order of *Nisi Prius*, or an agreement of reference containing a clause that it may be made a rule of court; for, in all these cases, the attendance of witnesses may be enforced (*s*). So it applies to a party attending at judge's chambers (*t*), or before a Master or Examiner in Chancery (*u*), or before the under-sheriff, on the execution of a writ of inquiry (*v*); as also to witnesses attending the Insolvent Debtors' Court (*x*), the Central Criminal Court (*y*), Commissioners of Bankruptcy (*z*), or the Registrar of the Court of Review (*a*), Courts-Martial (*b*), the Houses of Parliament, or committees of either House (*c*). It will also protect a prosecutor attending Quarter Sessions or Assizes (*d*), even after the bill in which he

(*r*) *Moore v. Booth*, 3 Ves. 350, 351; *List's case*, 2 Ves. & B. 374; *Ex parte Temple*, id. 395; *Randall v. Gurney*, 3 B. & A. 252.

(*s*) *Webb v. Taylor*, 1 Dowl. & L. 676, per Patteson, J.; *Riahton v. Nisbett*, 1 M. & Rob. 347; *Spence v. Stuart*, 3 East, 89; *Sanford v. Chase*, 3 Cowen, 381.

(*t*) *Moore v. Booth*, 3 Ves. 350, 351.

(*u*) *Id.*; *Wheeler v. Cox*, 3 Ir. Law R. 302 (n); *Brown v. M'Dermott*, 2 Ir. Eq. R. 438.

(*v*) *Walters v. Rees*, 4 Moore, 34.

(*x*) *Willingham v. Matthews*, 6 Taunt. 356; 2 Marsh. 57, S. C.

(*y*) *Newton v. Constable*, 2 Q. B. 162, per Coleridge, J.

(*z*) *Arding v. Flower*, 8 T. R. 534; *Ex parte Clarke*, 2 Dea. & C. 99. See also 6 Geo. 4, c. 16, § 117, which enacts, "that the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender; and after such surrender during forty-two days, and such further time as shall be allowed him for finishing his examination, provided he was not in custody at the time of such surrender; and if such bankrupt shall be arrested for debt, or on any escape warrant, in coming to surrender, or shall, after his surrender, be so arrested within the time aforesaid, he shall, on producing the summons under the hands of the commissioners to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shown such summons to him, so signed as aforesaid, such officer shall forfeit to such bankrupt, for his own use, the sum of 5*l.* for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit."

(*a*) *Ex parte Burt*, 2 Mon. D. & D. 666.

(*b*) 10 & 11 Vict. c. 12, § 15; 10 & 11 Vict. c. 13, § 17.

(*c*) *May*, Law of Parl. 110—112, and the journals there cited.

(*d*) *Graves v. M'Carthy*, 1 Cr. & Dix, Abr. C. 127.

is interested has been ignored, provided this fact has not been publicly announced (*e*).

§ 940. Whether a witness attending before a *magistrate* or other inferior judicial officer, by virtue of a summons or a writ of subpoena, would be privileged from arrest, has never been expressly determined in this country; though in America it has been held that such persons are protected (*f*); and on the principles of English law this decision would appear to be sound, since the privilege should surely be co-extensive with the power of enforcing attendance (*g*). It is very true that, in one of the numerous cases respecting Mr. Newton, who may perhaps claim the unenviable merit of having raised, in his own person, almost as many questions on this subject as all other parties put together, the Court of Queen's Bench decided that a barrister was not privileged from arrest, by reason of his attendance on Petty Sessions for the purpose of obtaining practice (*h*); and that Court, notwithstanding the case of *Luntly v. —* (*i*), and the Act of 6 & 7 Will. 4, c. 14, § 2 (*k*), has expressed some doubt as to whether the privilege can be extended further than to protect the bar while attending the superior courts, or perhaps such counsel as are actually engaged in professional business before the inferior tribunals. Still, in pronouncing the judgment of the Court in this case, Lord Denman thought proper to observe, that "the attendance of parties and of witnesses has always been protected. It is absolutely necessary for the ends of justice that their attendance should be privileged, because, without it, justice cannot be administered. But the protection of legal officers is of a different character, and may well be confined within narrower limits" (*l*).

§ 941. Although a party discharged from illegal civil process is privileged from arrest during his return home (*m*), the *discharge*

(*e*) In re M'Kone, Ir. Cir. Rep. 65. (*f*) Ex parte Edme, 9 Serg. & R. 147.

(*g*) See per Patteson, J., in *Webb v. Taylor*, 1 Dowl. & L. 684.

(*h*) *Newton v. Constable*, 2 Q. B. 157. (*i*) 1 Cr. & M. 579, noticed, 2 Q. B. 165.

(*k*) By which persons liable to summary conviction are empowered to make their defence before justices by counsel or attornies. (*l*) 2 Q. B. 166.

(*m*) In re Douglas, 3 Q. B. 837, per Lord Denman; *R. v. Blake*, 4 B. & Ad. 355; 2 N. & M. 312, S. C.

from criminal process, even in consequence of an acquittal, confers no such protection, unless it should appear that the apprehension on the criminal charge was a mere contrivance to get the party into custody in the civil suit (n). A distinction, however, has been drawn in Ireland, between the case of a prisoner actually in custody, and a party out on bail; and it has there been held, that a person, who attends under a recognizance to answer a criminal charge, and is acquitted and discharged, is privileged from arrest while returning home (o). The validity of this distinction would probably be questioned in the English courts, since an accused, who surrenders to take his trial, is, during that trial, as much in legal custody as a prisoner who is brought up by the gaoler himself.

§ 942. If a person entitled to privilege is *unlawfully arrested*, application for his *discharge* should be made, either to the court where the cause is depending, in respect of which the privilege is claimed, or to the court out of which the process issued, upon which the arrest takes place; for this last court ought not to suffer its process to be executed, in violation of the privileges of other tribunals (p). Though the one court should, on motion, refuse to interfere, the person arrested may seek relief from the other (q); and it would even seem, that, without applying to either of these courts, the arrested party may obtain his discharge by causing himself to be brought by habeas corpus before any one of the superior judges at chambers (r). Inferior tribunals, such as the Quarter

(n) *Goodwin v. Lordon*, 1 A. & E. 378; 3 N. & M. 879; 2 Dowl. 504, S. C.; *Anon.*, 1 Dowl. 157; *Buckmaster v. Cox*, 2 Ir. Law Rep. 101; *Jacobs v. Jacobs*, 3 Dowl. 677; *In re Douglas*, 3 Q. B. 838.

(o) *Callans v. Sherry*, Alc. & Nap. 125; *Kelly v. Barnewall*, Cook. & Alc. 94; *Williams v. Steele*, 4 Law Rec. 1st Ser. 169; *Babington v. Mahony*, 5 Law Rec. 2nd Ser. 232 (n).

(p) *Att.-Gen. v. Skinners' Co.*, 1 Coop. C. P. R. 1; *Randall v. Gurney*, 3 B. & A. 252; 1 Chitty R. 679, S. C.; *Ex parte Clarke*, 2 Dea. & C. 99; *Ex parte Burt*; 2 Mon. D. & D. 666; *Walker v. Webb*, 3 Anst. 941; *Selby v. Hills*, 8 Bing. 166; *Bours v. Tuckerman*, 7 Johns. 538.

(q) *Randall v. Gurney*, 3 B. & A. 255, per Bayley, J.

(r) *Ex parte Tillotson*, 1 Stark. R. 470, per Lord Ellenborough; *Towers v. Newton*, 1 Q. B. 319, 320, per Rolfe, B., after consulting Parke, B. See *Newton v. Constable*, 2 Q. B. 163, n. (b).

Sessions (s), Arbitrators (t), or the Sheriff's Courts (u), have no power to discharge arrested persons, unless they be arrested in the very face of the Court (x); and therefore, if a witness be taken into custody while attending these tribunals, he must have recourse to the superior court, out of which the process issued. In suits depending in Chancery, the motion may be made before the Master of the Rolls, though the cause, in attending which the person was arrested, has been set down for hearing in the Lord Chancellor's list (y). If the witness be arrested while attending commissioners of bankruptcy, the Vice-Chancellor who exercises the functions of the Court of Review will now discharge him (z), though the practice was formerly to apply to the Lord Chancellor (a). The Houses of Parliament will, of their own authority, discharge all persons unduly arrested, while attending before themselves, or before committees of either House (b); but witnesses summoned to give evidence before military or marine Courts-Martial, must, in the event of their arrest, apply by affidavit for their discharge either to the court out of which the process issued, or, if such court be not sitting, to some judge of the Superior Courts of Westminster or Dublin, or to the Court of Session in Scotland, or to the courts of law in the East or West Indies, or elsewhere, as the case shall require (c).

§ 943. It does not appear to be yet clearly determined, *within what time* the motion for discharge must be made, or how far the witness arrested may *waive* his protection. In America, where the protection is regarded as a personal privilege, the party arrested may waive it; and if he willingly submits to be taken into custody, he cannot afterwards object to the imprisonment as unlawful (d). In

(s) *Clerk v. Molineux*, T. Raym. 100; 1 Lev. 159; 1 Sid. 269; 1 Keb. 845, S. C.

(t) *Walters v. Rees*, 4 Moore, 36.

(u) *Id.*; *Wilson v. Sheriffs of London*, Brownl. 1.1, p. 15.

(x) *Wilson v. Sheriffs of London*, Brownl. 1. 1, p. 15.

(y) *Ahearn v. M'Guire*, 2 Ir. Eq. R. 437; *Mahon v. Mahon*, *id.* 440.

(z) *Ex parte Clarke*, 2 Dea. & C. 99; *Ex parte Burt*, 2 Mon. D. & D. 666.

(a) *Ex parte List*, 2 Rose, 24; 2 Ves. & B. 373, S. C.

(b) *May*, Law of Parl. 110—112, but the party arrested may apply, if he think fit, to the Court out of which the process issued; *Att.-Gen. v. Skinners' Co.*, 1 Coop. C. P. R. 1.

(c) 10 & 11 Vict. c. 12, § 15; *id.* c. 13, § 17.

(d) *Brown v. Getchell*, 11 Mass. 11, 14; *Geyer v. Irwin*, 4 Dall. 107.

Ireland the privilege is considered as bestowed for the good of the public; but there also it has been held, that the application for discharge must be made without delay (*e*). In this country the Courts hold, as in Ireland, that the privilege is not the privilege of the *person* attending the court, but of the *court* which he attends, it being established for the benefit of the suitors and the advancement of justice (*f*); and they, consequently, appear to have considered that a prisoner cannot, by laches, preclude himself from taking advantage of the illegality of his arrest; and that it is immaterial what interval may have been allowed to elapse between the arrest and the application for discharge, unless, perhaps, in a case where the interests of another party have been prejudiced by the delay (*g*). The allowance, however, or the disallowance of the privilege, is always discretionary; and it has been disallowed in collusive, as well as vexatious, actions (*h*).

§ 944. It is now finally decided that *no action*, whether in trespass or on the case, is maintainable against the sheriff or his officer for arresting a person while attending court as a witness; and this, too, though it be alleged and proved that the arrest was made maliciously, and with ample knowledge of the circumstances (*i*). It is also equally clear, that an action of trespass will not lie against the plaintiff or his attorney, who in such a case has entrusted the sheriff with the writ (*k*); neither will they be liable to an action on the case, if they have enforced the execution of the process without full knowledge of the privilege of the witness (*l*). Whether the fact of knowledge and the proof of

(*e*) In re —, 3 Ir. Law R. 301.

(*f*) Anon., 1 Dowl. 168, per Parke, J.; *Magnay v. Burt*, 5 Q. B. 393, per Tindal, C. J.; *Cameron v. Lightfoot*, 2 W. Bl. 1193, per De Grey, C. J.

(*g*) *Webb v. Taylor*, 1 Dowl. & L. 684—687, per Patteson, J. In that case 23 days had elapsed. See *Greenshield v. Pritchard*, 8 M. & W. 148, where, after the lapse of a year, the Court refused to interfere, though the party had been arrested under void process.

(*h*) *Magnay v. Burt*, 5 Q. B. 393; *Cameron v. Lightfoot*, 2 W. Bl. 1193; *Rast*. 476; Anon., 11 Mod. 79.

(*i*) *Magnay v. Burt*, 5 Q. B. 381; 1 D. & M. 652, S. C.; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Tarlton v. Fisher*, 2 Doug. 671.

(*k*) *Yearsley v. Heane*, 14 M. & W. 322; *Ewart v. Jones*, id. 774.

(*l*) *Stokes v. White*, 1 C. M. & R. 223; 4 Tyrwh. 786, S. C.

actual malice will make any difference in the position of the parties, may admit of much doubt; for although it has been held at *Nisi Prius*, that, under these circumstances, an action on the case is maintainable (*m*), this ruling is scarcely reconcileable with the doctrines since laid down by the Exchequer Chamber in *Magnay v. Burt* (*n*). If a witness who has been improperly arrested obtains an order from the Court for his discharge, and the sheriff afterwards disobeys this order, an action of trespass may, as it seems, be brought against the officer; for the further detention of the witness, without the authority of any writ to justify it, would become a new trespass and false imprisonment, in the same manner as if there had been a new caption (*o*).

§ 945. Although the witness arrested has no remedy by action, the party arresting him maliciously, and with a knowledge of the existence of his privilege, will not be free from punishment; for he may still have an *attachment* awarded against him for contempt of court (*p*). On the same principle, it is deemed a contempt, to serve process, even by summons, upon a witness in the immediate or constructive presence of the Court (*q*); though any service elsewhere, without personal restraint, would, it seems, be good. So, the preventing, or using any means to prevent, a witness duly summoned from attending court, is punishable as a contempt (*r*), and the endeavouring to intimidate a witness from giving evidence for the Crown in a prosecution, is indictable as a misdemeanor (*s*).

(*m*) *Whalley v. Pepper*, 7 C. & P. 506, per Little Dale, J. See *Ewart v. Jones*, 14 M. & W. 786, per Pollock, B.: *sed qu*.

(*n*) 5 Q. B. 381; 1 D. & M. 652, S. C. See also *Vandevelde v. Lluellin*, 1 Keb. 220.

(*o*) 5 Q. B. 395, per Tindal, C. J.

(*p*) *Cameron v. Lightfoot*, 2 W. Bl. 1193, 1194; *Vandevelde v. Lluellin*, 1 Keb. 220; *Magnay v. Burt*, 5 Q. B. 394, per Tindal, C. J.

(*q*) *Cole v. Hawkins, Andrews*, 275; *Blight v. Fisher*, 1 Peters, C. C. R. 41; *Miles v. McCullough*, 1 Binn. 77. (*r*) *Com. v. Feely*, 2 Virg. Cas. 1.

(*s*) *R. v. Loughran*, 1 Cr. & Dix, Cir. R. 79, per Burton, J. See also 27 Geo. 3, c. 15, § 8, Ir.

CHAPTER II.

OF THE COMPETENCY OF WITNESSES (a).

§ 946. ALTHOUGH, in the ordinary affairs of life, temptations to practise deceit and falsehood may be comparatively few, and therefore men may ordinarily be disposed to believe the statements of each other; yet, in judicial investigations, the motives to pervert the truth and to perpetrate falsehood and fraud are so greatly multiplied, that if statements were received with the same indiscriminating freedom as in private life, the ends of justice would incur much risk of being defeated. In private life, men can at their leisure determine for themselves, with whom they will deal, and in whom they will confide; but the situation of judges and jurors renders it often difficult, and sometimes impossible, in the narrow compass of a trial, to investigate the character of witnesses; and from the very nature of judicial proceedings, and the necessity of preventing the multiplication of issues, it must occasionally happen that witnesses unworthy of credit will receive as much consideration as those who deserve the fullest confidence. The danger of injustice arising from this cause has always been felt in all civilized countries; and, with the view of rendering the evil as inoperative as possible, it has ever been deemed expedient that some kinds of evidence should be uniformly excluded.

§ 947. In determining what evidence shall be admitted and weighed by the jury, and what shall not be received at all, or, in other words, in distinguishing between competent and incompetent witnesses, a principle seems to have been applied, similar to that which distinguishes conclusive from disputable presumptions of law (b), namely, the experienced connexion between the situation of the witness and the truth or falsity of his testimony. Thus, the law excludes as incompetent those persons, whose evidence, in general, is considered more likely than other-

(a) The question of competency, though involving facts, is one to be determined by the Court alone. See ante, § 21.

(b) Ante, §§ 58, 90.

wise to mislead juries; receiving and weighing the testimony of others, and giving to it that degree of credit, which it is found on examination to deserve. It is obviously impossible that any test of credibility can be infallible. All that can be done is to approximate to such a degree of certainty, as will ordinarily meet the justice of the case. The question is not, whether any rule of exclusion may not sometimes shut out credible testimony; but whether it is expedient, that there should be any rule of exclusion at all. If the purposes of justice require that the decision of causes should not be embarrassed by statements generally found to be deceptive or totally false, there must be some rule designating the class of evidence to be excluded; and in this case, as in determining the ages of discretion and of majority, and in deciding as to the liability of the wife for crimes committed in company with her husband, and in numerous other instances, the law merely professes to follow the common experience of mankind.

§ 948. If the rules of exclusion, recognised till lately by the English Law, were really founded, as they purported to be, on public experience, they would furnish a most revolting picture of the ignorance and depravity of human nature. In rejecting the evidence of interested witnesses, the law acted on the presumption, not only that such persons, sooner than make a statement which might prejudice themselves, would commit deliberate perjury, but that, if they did so, juries would be incapable of detecting the falsehood. A more unfounded calumny upon the veracity of witnesses and the intelligence of juries cannot well be imagined. So, also, the disqualification of a witness, which followed his conviction of an infamous crime, rested on the equally fallacious assumption, that, having been once guilty of a dereliction of duty, he would ever after be regardless of truth, even though he should have no private interest to serve. It is true that, in modern times, the palpable injustice which a strict adherence to these rules was found to cause, and the consequent growing disposition of the judges to narrow, as far as possible, their effect, and to convert questions of competency into questions of credibility, occasioned the introduction of many exceptions; still the rules, subject to these exceptions, continued to prevail in our courts of

justice, and the very exceptions, which were intended to limit their operation, became in their turn productive of frequent injustice. The difficulty of deciding whether any particular witness fell within the rule or the exception was so great, and the consequences of an erroneous decision were so costly and harassing, that little practical benefit resulted from the change. If, relying on the opinion of the judge that a certain important witness was competent to testify, a party determined upon calling him, and was thus enabled, in the first instance, to establish a just, or to resist an unjust, claim, it frequently happened that the Court above differed in opinion with the judge who presided at the trial; the consequence of which was, that the verdict was set aside without any regard to the real merits of the case, and the party who had obtained it was driven, at a large expense, and to his infinite annoyance, to seek for a second verdict perhaps equally inconclusive.

§ 949. It was in vain that, at the commencement of the present century, Jeremy Bentham boldly undertook to expose the abuses of this system, and ventured to assert that, if the discovery of truth were the end of the rules of evidence, and sagacity consisted in the adaptation of means to ends, the sagacity displayed by the sages of law in defining these rules was as much below the level of that displayed by an illiterate peasant or mechanic in the bosom of his family, as, in the line of physical science, the sagacity shown by the peasant was to that evinced by a Newton (c). Lawyers, wedded to a system, which they arrogantly deemed the perfection of reason, listened with impatience to arguments, which, if adopted, would compel them to unlearn the lessons of their youth; while the uninitiated, for the most part, regarded the controversy with indifference, as though, forsooth, it related to a subject in which they had no interest, or else refrained from expressing, if not from forming, an opinion upon matters, respecting which they felt themselves incompetent to decide. The truth is, that, at the time when Mr. Bentham's work on Evidence first made its appearance, the world in general regarded the author as

(c) 1 Rat. of Judl. Ev. 6.

a gentleman who delighted in paradox and wrote bad English, while in the judgment of even the discerning few, this great apostle of judicial reform ranked little higher than an ingenious theorist. But truth, though long discountenanced, will at length prevail; and thus, by little and little, Mr. Bentham's opinions were at first canvassed, then recognised as correct (*d*), and finally, in a great measure, adopted by the Legislature.

§ 950. The first blow, aimed at the old law of incompetency, was dealt in the year 1833 by the Act of 3 & 4 Will. 4, c. 42. §§ 26 and 27 are as follows: "In order to render the rejection of witnesses on the ground of interest less frequent, be it enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him. And it is further enacted, that the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceedings in which the verdict or judgment shall be offered in evidence."

§ 951. These sections were, in 1840, re-enacted in an Irish statute (*e*); and by furnishing a simple method for restoring the

(*d*) See 1 Ph. Ev. 42—44, where the arguments for and against the rule which excluded witnesses on account of interest are very fairly stated.

(*e*) 3 & 4 Vict. c. 105, §§ 51, 52, Ir.

competency of witnesses, who were only so far interested in the event of the action, that the record might in a subsequent suit be evidence for or against themselves, effected a material amendment in the then existing law, and were hailed by the converts to Mr. Bentham's philosophy, as the harbingers of a far more extensive change. It was not, however, till the session of 1843 that the hopes of these advocates of reform were destined to be realised, when a bill, brought into the House of Lords by Lord Denman, was, after considerable discussion, passed into an Act (*f*).

§ 952. This Act, after stating in the preamble that "whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony"; enacts "*that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest (g), from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter,*

(*f*) 6 & 7 Vict. c. 85.

(*g*) The Act of 3 & 4 Vict. c. 59, § 1, may here be noticed, as it enacts, that "it shall, by the law of *Scotland*, be no objection to the admissibility of any witness that he or she is the father or mother, or son or daughter, or brother or sister, by consanguinity or affinity, or uncle or aunt, or nephew or niece, by consanguinity, of any party adducing such witness in any action, cause, prosecution, or other judicial proceeding, civil or criminal; nor shall it be competent to any witness to decline to be examined and give evidence on the ground of any such relationship."

question, or injury (*g*), or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been *previously convicted of any crime or offence* (*h*) : Provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively ; provided also, that this Act shall not repeal any provision [in the New Will Act] (*i*) : Provided that in Courts of Equity any defendant to any cause pending in any such court, may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions ; and that any interest which such defendant, so to be examined, may have in the matters, or in any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect, the credit of such defendant as a witness."

§ 953. It will be seen that, by the provisoes here introduced, some few exceptions have been engrafted on the general rule, that no interested witness shall be incompetent to give evidence. So far the triumph of Mr. Bentham's proposition, that "in the character

(*g*) *Sic* in printed statute. Qu. "*inquiry*."

(*h*) Independent of this Act, witnesses are competent, though not compellable, to testify to their own turpitude ; as for instance, to admit that their former oaths were corruptly false, *R. v. Teal*, 11 East, 309 ; *Rands v. Thomas*, 5 M. & Sel. 244 ; or to prove that notes, to which they have given credit and currency by their signatures, have been fraudulently concocted by them. *Jordaine v. Lashbrooke*, 7 T. R. 601, overruling *Walton v. Shelley*, 1 T. R. 296. In fact, the maxim of the civil law, "*nemo allegans suam turpitudinem est audiendus*," is not recognised in English courts of justice : and the decisions of Jefferies, C. J., and Legge, B., who are both reported to have rejected witnesses, when called to prove that they had perjured themselves on some former occasion, are no longer of any authority. See *Titus Oates' case*, 10 How. St. Tr. 1185, 1186 ; and *Eliz. Canning's case*, 19 How. St. Tr. 632.

(*i*) 7 Will. 4 & 1 Vict. c. 26, §§ 14—17 ; cited post, § 977.

of objections to competency, no objections ought to be allowed" (*k*), has, for the present, failed to be complete; still we entertain little doubt, but that, after the expediency of the present measure has been tested by experience, the Legislature will determine to carry out the principle to its legitimate extent; and we hope that in the next edition of our work, we may be enabled, at least, to strike out the sections which relate to the incompetency of *parties*. Every argument that can be urged in favour of admitting the evidence of interested witnesses in general, applies also to that of parties. And, if, on the one hand it is admitted that parties have usually a stronger inducement to mislead a jury, than any witnesses they can call, so it may be well urged on the other, that they, for the most part, are the best acquainted with the real circumstances of the case at issue. Besides, the motive to deceive being at least as apparent as it is strong, the Court and jury will naturally sift with proportionate suspicion the testimony of such persons, and thus, being on their guard, will refrain from giving implicit credit to statements, which, coming from a less suspicious quarter, would demand unhesitating belief. At our Police Courts, in Courts-Martial, in the New County Courts (*l*), and in most of the summary proceedings before magistrates, parties tell their own tales, and no inconvenience is felt from the prevalence of this practice. So also in criminal prosecutions, which, though nominally instituted in the name of the Crown, and having for their declared object the satisfaction of public justice, are in fact carried on at the instance of the injured party, the prosecutor has ever been admitted as a competent witness; and there is no pretence for asserting that the fountains of justice have been defiled by the contaminating influence of such testimony. Much more might be urged in favour of admitting the evidence of parties, than what has been here advanced; but this is not the place for discussing the policy of any proposed legislative measure. We turn, therefore, from the seductive question of what the law ought to be, to the more practical one of what the law is.

§ 954. The *present law rejects the testimony*, first, of interested parties individually named on the record; secondly, of certain

(*k*) 1 Rat. of Judl. Ev. 3.

(*l*) 9 & 10 Vict. c. 95, § 83.

individuals, who stand in an analogous position to that of such parties; thirdly, of the husbands and wives of persons included in either of these two classes; fourthly, in cases of high treason and misprision of treason, other than such as consist in injuring or attempting to injure the Queen's person (*m*), of such persons as are not included or properly described in the list of witnesses delivered to the defendant pursuant to statute (*n*); and, lastly, of persons insensible to the obligations of an oath. To the first three of these general rules there are a few exceptions, which will be noticed in their proper places.

§ 955. The FIRST CLASS OF PERSONS whom the law in general regards as INCOMPETENT TO TESTIFY, comprises all *parties* to any suit, action, or civil or criminal proceeding, who are *individually named* in the record, and also in some way *directly interested* in the event of the inquiry. We have seen (*o*) that the recent Act for preventing the rejection of witnesses "by reason of incapacity from crime or interest," excepts from its operation, among other persons who will be more particularly alluded to hereafter, all parties individually named on the record; that is, it does not render such persons incompetent to testify, for it is in no respect a *disqualifying* statute, but it simply leaves untouched the previous law on the subject of parties, with the single exception of confining its operation to such parties as are *individually named*. The effect of this last exception is, that if a suit, action, or other legal proceeding be instituted by or against a corporation aggregate, or against the collective inhabitants of a district, or the like, individual corporators or inhabitants, not being personally named, will no longer be incompetent witnesses (*p*), unless perchance they should be excluded by the further exception in Lord Denman's Act, which extends to "any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part" (*q*). We may add, that a *procchein ami*, or guardian,

(*m*) See 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, § 2, 1r.; 5 & 6 Vict. c. 51, § 1; ante, § 696.

(*n*) 7 Ann. c. 21, § 11.

(*o*) Ante, § 952, where the Act of 6 & 7 Vict. c. 85, § 1, is set out.

(*p*) *Sinclair v. Sinclair*, 13 M. & W. 645, per Parke, B.

(*q*) The meaning of these words will be discussed post, § 974, et seq.

suing for an infant, is not such a party to the record as to be an incompetent witness under this rule (*r*). Neither can the prosecutor of any criminal charge, whether by indictment or information, or the complainant or informer in any summary proceeding, be deemed a party to the record, so as to render his testimony inadmissible.

§ 956. It must next be observed, in support of the proposition as given above, that the law recognises no abstract technical rule excluding parties, *simply as parties* (*s*), but that their incompetency rests on the assumption, whether warrantable or not is another question, that, as in general they are immediately and deeply interested in the event of the inquiry, their testimony would only multiply temptations to commit perjury, and tend to mislead incautious juries, while its exclusion would cause no injury to truth, since evidence coming from so suspicious a quarter could never induce any rational belief. In all cases, therefore, where a party individually named on the record is tendered as a witness, the simple question would seem to be, aye or no, has the witness any *direct interest* in giving evidence on behalf of the party calling him? that is, will any direct, immediate, and necessary consequence beneficial to his interest flow from a verdict in favour of such party, or will a corresponding detriment result to him from a verdict the other way (*t*)? If he has not such an interest, he is a competent witness; if he has, his testimony cannot be heard (*u*). Thus, if commissioners or a company were authorised by statute to sue or be sued in the name of their clerk or other public officer, and the Act were to contain a clause protecting such officer from all personal liability, it would seem, upon principle, that, though the officer were individually named on the record, he would still be a

(*r*) *Sinclair v. Sinclair*, 13 M. & W. 640.

(*s*) *Worrall v. Jones*, 7 Bing. 398, 399, per Tindal, C. J.; *Pipe v. Steele*, 2 Q.B. 736, per Lord Denman.

(*t*) See *Yardley v. Arnold*, 10 M. & W. 144, per Parke, B.

(*u*) *Worrall v. Jones*, 7 Bing. 398, 399, per Tindal, C. J.; *Pipe v. Steele*, 2 Q. B. 736, per Lord Denman; 3 & 4 Will. 4, c. 42, §§ 26, 27, cited ante, § 950.

competent witness either for or against the parties he represents, even should no section be found in the Act, expressly rendering him capable of being examined. Still, in order to render a party to the record inadmissible as a witness, it is not necessary that he should have any beneficial interest in the subject-matter in dispute, but it will be sufficient if he be interested in the simple question of costs.

§ 957. The question of the interest, and consequent competency, of parties most frequently arises in those cases, where actions or criminal proceedings have been originally brought against two or more persons, but are subsequently prosecuted against some only of the defendants; the issues respecting the liability or guilt of the others having been previously suspended or determined, by either a *nolle prosequi*, a *separate verdict* of acquittal, a *judgment by default*, or a *plea of guilty*. In the first of these events, the party who is thus released from present liability, and virtually removed from the record, may, in all cases, whatever be the form of proceeding, be called as a competent witness either for (*x*) or against (*y*) his co-defendants, because it is impossible in such a case, that the witness can have any direct interest in the result of the inquiry. It is true that this course can seldom be pursued, except in actions of *tort*, and in criminal proceedings, because in actions of *contract* all the defendants are regarded as *jointly* liable, and consequently the plaintiff cannot enter a *nolle prosequi* as to one, and proceed against the remainder, unless such one has pleaded some matter of *personal discharge*, as *bankruptcy*, *insolvency*, or *ne unques executor* (*z*). A mere several plea setting up an original personal disability, as infancy or coverture before the commencement of the suit, will not enable the plaintiff to abandon his claim against the individual so pleading,

(*x*) *Affalo v. Fourdrinier*, 6 Bing. 306; 3 M. & P. 745, S. C.; *Emmet v. Butler*, 7 Taunt. 607, per Park, J.; *R. v. Sherman*, Cas. temp. Hardw. 303. In this last case, two persons were indicted for assault; one pleaded in abatement, and there being no replication, was discharged. He was then admitted as a witness for the other defendant.

(*y*) *R. v. Ellis*, 1 MacNally Ev. 55; *Ward v. Man*, 2 Atk. 229.

(*z*) *Salmon v. Smith*, 1 Wms. Saund. R. 207 *a*, notes (2) a^d (1); *Moravia v. Hunter*, 2 M. & Sel. 444; *Noke v. Ingham*, 1 Wils. 89.

and to continue the action against the remaining defendants (*a*). We may add, that even in actions of trespass, the plaintiff, if he intends to enter a *nolle prosequi* as to one of the defendants in order to call him as a witness, must take the necessary steps a reasonable time before the trial; for if he applies to the judge at *Nisi Prius* only a short while before the jury are sworn, his application will be refused (*b*).

§ 958. The effect of a *separate verdict* in favour of one defendant, whether in a civil or criminal cause, is precisely the same as that of a *nolle prosequi*; that is, it renders the acquitted defendant a competent witness either for or against his fellows (*c*). But here the questions arise, *in what manner, on what grounds, and at what stage of the cause*, is a *separate verdict* to be obtained? The answer to these queries is by no means easy, where the witness is to be called on behalf of the defendants; but the better opinion seems to be, 1st. That a special application must be made to the judge, to direct a separate verdict to be found; 2ndly. That such an application is strictly an appeal to his discretion; 3rdly. That this discretion must be regulated by a careful attention to all the circumstances of the case, and should not be exercised, unless it distinctly appears that the defendant was improperly joined in the suit, or must inevitably be acquitted, either from the absence of any evidence against him, or, perhaps, on account of his having conclusively established a ground for personal discharge (*d*); and, lastly, but this is a corollary from the preceding rule, that the application cannot be entertained until after the plaintiff's case has been entirely closed (*e*), nor even then, unless there be the strongest reason to suppose, that no failure of justice will result from such a step (*f*). If the testimony of one of the

(*a*) 1 Wms. Saund. R. 207 *a*, notes (2) and (1).

(*b*) *Spencer v. Harrison*, 2 C. & Kir. 429, per Erle, J.

(*c*) *Hawkesworth v. Showler*, 12 M. & W. 48—50.

(*d*) *Bate v. Russell*, M. & M. 332, per Parke, B. But see *Raven v. Dunning*, 3 Esp. 25, per Lord Kenyon; *Currie v. Child*, 3 Camp. 283, per Lord Ellenborough; *Emmet v. Butler*, 7 Taunt. 599; S. C. nom. *Emmett v. Bradley*, 1 Moore, 332.

(*e*) *Hawkesworth v. Showler*, 12 M. & W. 48, per Lord Abinger.

(*f*) *White v. Hill*, 6 Q. B. 487, overruling *Child v. Chamberlain*, 1 M. & Rob.

defendants is required by the plaintiff or the Crown, the usual course is to apply for a verdict of acquittal before opening the case (g); but it seems that the Court, in its discretion, will direct an acquittal, either during the progress, or on the termination, of the case, if no evidence has been given inculcating the party who is sought to be made a witness against his fellows (h). In a late case, however, where the parties, being sued in trespass, appeared by one attorney, and jointly pleaded not guilty "by statute," the Court would not, at the conclusion of the opening, allow one of them to be acquitted at the instance of the plaintiff, the counsel for the defence stating that he appeared for the three defendants, and that he objected to such acquittal at that stage of the proceedings (i). It is scarcely necessary to add, that, so long as the plea of not guilty remains on the record undisposed of, a prisoner jointly indicted with others cannot be called as a witness either for the prosecution or for the defence (k).

§ 959. Where *judgment by default* has been entered up against one of several defendants, his admissibility as a witness *for his co-defendants* will depend, in great measure, on the form of the action. If it be an action *ex contractu*, he clearly cannot testify; because the contract being laid jointly, the judgment by default can operate against him only in the event of a verdict being

318; 6 C. & P. 213, S. C.; and recognising *Sowell v. Champion*, 6 A. & E. 407; 2 N. & P. 621, S. C. In this last case, Lord Denman, in delivering the judgment of the Court, thus lays down the law: "The application to a judge, *in the course of a cause*, to direct a verdict for one or more of several defendants in trespass is strictly to his discretion; and that discretion is to be regulated, not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is so palpable a failure of justice, when the evidence for the defence discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place, but where there is the strongest reason to believe that such a consequence cannot follow." P. 415, 416. See also *Wright v. Paulin*, Ry. & M. 128, per Best, C. J.; and *Spencer v. Harrison*, 2 C. & Kir. 429, 431, per Erle, J.

(g) *R. v. Rowland*, Ry. & M. 401, per Abbott, C. J.

(h) *R. v. Fraser*, 1 MacNally Ev. 56.

(i) *Spencer v. Harrison*, 2 C. & Kir. 429, per Erle, J.

(k) *R. v. Ryan*, 1 Jebb, C. C. 24; *Ward v. Man*, 2 Atk. 229; *Hawkesworth v. Showler*, 12 M. & W. 49, per Alderson, B.

obtained against the others ; and, therefore, he has a direct interest in protecting his fellows from defeat (*l*). But, if the action be *in tort*, and as such be in its nature and legal consequences several, the defendant, who has suffered judgment by default, and who consequently will remain liable notwithstanding the subsequent acquittal of his co-defendants, will be a competent witness for them (*m*), unless the plea on which they rely be of such a nature as to show that the plaintiff has no cause of action against any of the defendants in the suit, or unless the jury, in addition to their pronouncing a verdict on the issues joined, have to assess the damages due from the defaulter. In either of these events the witness, it seems, will be incompetent. In the first, because, being entitled to the benefit of the defence, if established, he has obviously as direct an interest in the result as if the action were upon a joint contract (*n*) ; in the second, inasmuch as his interest would lead him so to colour the circumstances of the case, as to effect a reduction of the damages against himself (*o*). In actions of ejectment, if a defendant lets judgment go by default, or allows a verdict to be given against him for so much as he is proved to be in possession of, he becomes a competent witness for the other defendants (*p*). Even in those cases where a party suffering judgment by default would not be admissible as a witness, he may be subpœnaed by his co-defendants to produce a deed on which they rely (*q*).

§ 960. If a defendant, who has suffered judgment by default, be called *for the plaintiff*, and the action be on a *contract*, he will be a competent witness ; because, although it may be said that he

(*l*) *Mant v. Mainwaring*, 8 Taunt. 141, per Park, J. ; *Bell v. Banks*, 3 M. & Gr. 261, per Bosanquet, J. ; *Brown v. Fox*, 1 Ph. Ev. 49, per Lord Kenyon ; *Fitzgerald v. Hennessy*, Ir. Cir. R. 342, per Ball, J.

(*m*) *Ward v. Haydon*, 2 Esp. 552, per Lord Kenyon ; S. C. nom. *Ward v. Ventom*, Pea. Ad. Cas. 127 ; recognised by Lord Abinger in *Hawkesworth v. Showler*, 12 M. & W. 48 ; *Chapman v. Graves*, 2 Camp. 334, per Le Blanc, J. ; *Com. v. Marsh*, 10 Pick. 57, 58.

(*n*) 1 Ph. Ev. 52, n. (1).

(*o*) *Mash v. Smith*, 1 C. & P. 577, per Best, C. J. ; *Hawkesworth v. Showler*, 12 M. & W. 50, per Rolfe, B. ; 2 Camp. 333, 334, n.

(*p*) *Dormer v. Fortescue*, B. N. P. 98, 286.

(*q*) *Colley v. Smith*, 4 Bing. N. C. 285.

is interested in throwing a part of the burden, to which he has admitted himself liable, on his co-defendants, it is clear that he has a far more direct interest in screening them from liability; for unless the case as against them be established, no judgment can be had against himself (*r*). So, in a joint action of ejectment, one of the defendants, who has suffered judgment by default, has been admitted as a witness for the lessor of the plaintiff. An objection, indeed, was taken to his testimony, on the ground that, by obtaining a verdict against his co-defendant, he would make him liable for mesne profits, and thus to a certain extent protect himself; but the Court held that this was far too remote an interest to render the witness incompetent (*s*). In an action *ex delicto*, however, a defendant, who had suffered judgment by default, was rejected at *Nisi Prius* as a witness, when called by the plaintiff to inculcate his fellows; the ground of the decision apparently being, that the witness was interested in proving the other defendants guilty, since by so doing he enabled the plaintiff, if he thought fit, to levy all the damages exclusively upon them (*t*). It may be questionable how far this case is an authority at the present day.

§ 961. Where two or more persons are indicted together, and one of them *pleads guilty*, he may be called as a witness for the Crown, at least if he has not been sentenced (*u*); and the better opinion seems to be, that he will also be an admissible witness for the other prisoners (*x*), unless, perhaps, in those few cases where the indictment is so framed as to give him a direct interest in obtaining their discharge. For instance, if he were indicted for a

(*r*) *Pipe v. Steele*, 2 Q. B. 733; *Worrall v. Jones*, 7 Bing. 395; 5 M. & P. 261, S. C.; *Dresser v. Clarke*, 1 C. & Kir. 569, per Cresswell, J. These cases overrule *Mant v. Mainwaring*, 8 Taunt. 139; *Brown v. Brown*, 4 Taunt. 752; *Green v. Sutton*, 2 M. & Rob. 269.

(*s*) *Doe v. Green*, 4 Esp. 198, per Lord Ellenborough.

(*t*) *Chapman v. Graves*, 3 Camp. 333, 334, n., per Le Blanc, J.

(*u*) *R. v. Hinks*, 1 Den. C. C. 84; 2 C. & Kir. 462, S. C.; *Hawkesworth v. Showler*, 12 M. & W. 49, per Alderson, B.

(*x*) *R. v. George*, C. & Marsh. 111, per Coltman, J.; *R. v. Fletcher*, 1 Stra. 633. In *R. v. Lafone*, 5 Esp. 154, Lord Ellenborough is reported to have ruled the other way, but this case is probably not law.

conspiracy (*y*) or a riot (*z*) with the other defendants, or as an accessory to their guilt, or for unlawfully entering land with them by night, being armed for the purpose of taking game (*a*), or for assembling with them armed to assist in the illegal landing of goods (*b*), it might be very questionable whether he could be a competent witness for them; because, in each of these cases—and there are several others of a similar kind—the crime can only be effected by the guilty concurrence of more than one individual; and, therefore, the acquittal of the other defendants would, notwithstanding the admission of guilt by the witness, cause such a repugnancy on the record, that no valid judgment, as it seems, could be pronounced upon him (*c*). A doubt may also be entertained, whether a prisoner, who has pleaded guilty to an infamous crime (*d*), and *been sentenced*, can be called as a witness either for the prosecution or the defence; for, although Lord Denman's Act restores in general the competency of infamous witnesses, it excepts parties individually named on the record (*e*). Perhaps, in this case, the Court might consider the recording of a plea of guilty as tantamount to a removal from the record (*f*).

§ 982. It will now be expedient to point out briefly a few *exceptions* to the rule rejecting the testimony of parties to the

(*y*) To constitute the crime of conspiracy *two* persons at least must be engaged in it; 1 Hawk. P. C. c. 72, § 8.

(*z*) A riot can only be committed by *three* persons or more; 1 Russ. C. & M. 266; and the same number of persons is required to constitute the offence of seamen riotously assembling, and forcibly obstructing the loading, unloading, sailing, or navigating of any vessel. See 33 Geo. 3, c. 67, § 1. The refusing to disperse after proclamation is only felony when *twelve* or more persons are unlawfully assembled. See 1 Geo. 1, st. 2, c. 5, § 1.

(*a*) Under 9 Geo. 4, c. 69, § 9. Here, *three* or more persons must be together.

(*b*) Under 8 & 9 Vict. c. 87, § 63. Here, also, three or more persons must have assembled. To render the offence of being found with goods liable to forfeiture a felony, six persons must be in company, except under special circumstances of aggravation. See § 65.

(*c*) See *R. v. Cooke*, 5 B. & C. 538; *R. v. Kenrick*, 5 Q. B. 49, and the authorities cited in each of these cases.

(*d*) As to what are infamous crimes, see 1 Ph. Ev. 14 et seq.

(*e*) Ante, § 952.

(*f*) See *Hawkesworth v. Showler*, 12 M. & W. 49, 50, per Alderson, B.; *R. v. Lyons*, 9 C. & P. 555.

record, which, from time to time, have been either established by the Legislature, or recognised by the Courts. And, first, as to Acts of Parliament. The most remarkable of these relates to the recovery of small debts and demands in the County Courts, and provides (*g*), "that, on the hearing or trial of any action, or on any other proceeding under that Act, the parties thereto, their wives, and all other persons, may be examined, either on behalf of the plaintiff, or defendant, upon oath, or solemn affirmation in those cases in which persons are by law allowed to make affirmation instead of taking an oath, to be administered by the proper officer of the Court." Again, arbitrators appointed under the companies, the lands, and the railways, clauses Consolidation Acts (*h*), are empowered to call for the production of any documents in the possession or power of either party, which they may think necessary for determining the question in dispute, and to examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose. So, arbitrators nominated to settle disputes between masters and workmen, are directed by statute to hear and examine the parties, as well as their witnesses (*i*); and independently of any Act of Parliament, it is now usual to insert in orders of reference a clause enabling the arbitrator, at his discretion, to examine the parties upon oath.

§ 963. Many of the Acts which authorise the examination of parties, will be found to relate to cases, where the actual party to the record is either a *nominal party*, or is only *one of many persons*, on whose behalf or against whom the proceeding is really instituted, and where, consequently, his individual interest in the result will almost of necessity be exceedingly small. For instance, the Act of 3 & 4 Vict. c. 110 (*k*), after authorising trustees appointed by Loan Societies to sue or be sued concerning the property or claim of their respective *cestuis que trust* (*l*), enacts, "that, on the trial of any suit, or other proceeding respecting the property of any society established under the authority of this Act,

(*g*) 9 & 10 Vict. c. 95, § 83.

(*h*) 8 & 9 Vict. c. 16, § 132; 8 & 9 Vict. c. 18, § 32; 8 & 9 Vict. c. 20, § 133.

(*i*) 5 Geo. 4, c. 96, §§ 5, 8.

(*k*) Continued by annual Acts. See 10 & 11 Vict. c. 53.

(*l*) § 8.

or in any proceedings before any justice of the peace, or in any court, any trustee, treasurer, manager, shareholder, officer, clerk, or servant of such society, shall be a competent witness, notwithstanding any interest he may have in the result of such suit, or other proceeding" (*m*). So, the Act of 7 W. 4 & 1 Vict. c. 73, which empowers Her Majesty to confer certain powers and immunities on trading and other companies, provides that the letters patent may declare, that such companies may sue and be sued in the name of one of two officers to be appointed for that purpose; or in the event of there being no such officer, then, that they may be sued in the name of any member (*n*); and it afterwards goes on to enact, that, "in all such actions, suits, and other proceedings, whether civil or criminal, the evidence of any such officer as aforesaid, or of any member of such company or body, shall be admissible in the like manner, as if such officer or member were not an officer or member of such company or body" (*o*). The Act, too, of 3 & 4 Vic. c. 26, enacts (*p*), "that no churchwarden, overseer, or other officer in and for any parish, township, or union, or any person rated or assessed, or liable to be rated or assessed [to the relief of the poor, or for or towards the maintenance of the church, chapel, or highways, or for any other purpose whatever], shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding, by reason only of his being a party to such trial, appeal, or other proceeding, or of his being liable to costs in respect thereof, when he shall be only a nominal party to such trial, appeal, or other proceeding, and shall be only liable to contribute to such costs in common with other the rate-payers of such parish, township, or union." So, on the trial of any action, indictment, or other proceeding respecting the property of any friendly society enrolled under the authority of 10 G. 4, c. 56, 4 & 5 W. 4, c. 40, or 9 & 10 Vict. c. 27, or in any proceedings before any justice, "any member of such society shall be a competent witness, and shall not be objected to on account of any interests he may have as such member in the result of such action, indictment, or other proceeding" (*q*).

(*m*) § 25.

(*n*) §§ 3, 22.

(*o*) § 23.

(*p*) § 2. This enactment overrules *R. v. Rec. of Bath*, 9 A. & E. 714.

(*q*) 4 & 5 Will. 4, c. 40, § 10; 9 & 10 Vict. c. 27, § 22.

§ 964. With respect to the exceptions which prevail independent of any statute, the first to be mentioned is that which is allowed in Courts of Equity, where the *answer* of the defendant, so far as it is strictly responsive to the bill, is admitted as evidence in his favour, as well as against him. The reason is, that the plaintiff, by appealing to the conscience of the defendant, admits that his answer is worthy of credit as to the matter of the inquiry. It is not conclusive evidence, but is treated like the testimony of any other witness, and is decisive of the question only where it is not outweighed by other testimony (*r*).

§ 965. It sometimes happens, that, on the trial at law of an issue directed out of Chancery, the Equity Court will order that the answer of the defendant shall be read in evidence to the jury. The ground upon which this practice rests has been well explained by Lord Hardwicke, who, in the case of *Glynn v. The Bank of England* (*s*), observes, "that, if there is a bill on an equity in the Court of Chancery, and the fact on which it arises is denied by the answer, and the equity proved there but by one witness for the plaintiff, he can never have a decree, if it rests on the oath of the defendant against one witness, and no more: but there are cases, in which the Court has doubted concerning the fact, and has directed a trial at law; then the objection by the defendant is very clear, that if it was sent to law barely, the plaintiff calls his witness, the defendant cannot make use of his answer, and the plaintiff must recover, and therefore the Court might as well reverse their rule; to avoid which absurdity the Court says, the defendant's answer shall be read to the jury; for whose consideration it will be, what credit the answer shall have."

§ 966. In courts of law, too, affidavits sworn by either party may, in general, be read in support of, or in opposition to, any *interlocutory* motion; and even at *Nisi Prius*, it would seem from some old cases, that the oath of the party will be received respecting questions, which in their nature are preliminary to the principal subject of controversy, and, as such, are addressed to the

(*r*) 2 Story on Eq. Jurisp. § 1528; *Clark's Exors. v. Van Reimsdyk*, 9 Cranch, 160; ante, § 703.

(*s*) 2 Ves. Sen. 42. See also 1 Eq. Ab. Cas. 229.

Court. Of this nature is a party's affidavit of the materiality of a witness ; of diligent search made for a witness, or for a paper ; of the death of a witness, or of his inability to attend ; or of the like matters (*t*). In America this exception has been carried much further than would probably be permitted in this country ; and it has been *there* held, that if a deed or other material instrument of evidence has been proved to have once existed, a party's own oath may be received to establish the fact and circumstances of its loss, provided it was lost out of his own custody (*u*).

§ 967. Again, it would seem, that the oath of a party, taken *diverso intuitu*, may, in order to avoid a failure of justice, be sometimes admitted at law in his favour. Thus, upon the trial of an action for malicious prosecution, in causing the plaintiff to be indicted, proof of the evidence given by the defendant on the trial of the indictment is said to be admissible, in support of probable cause, because otherwise there might be no possibility of making a good defence (*x*). So, in America it has been held, that, in considering the question of the originality of an invention, the letters patent having been put in evidence, the oath of the inventor, taken prior to the issuing of the letters patent, that he was the true and first inventor, might be opposed to the oath of a

(*t*) *Fortescue & Cooke's case*, Godb. 193 ; *Anon.* Godb. 326 ; *Jevens v. Harridge*, 1 Wms. Saund. R. 9 *a* ; *Sidgier v. Aldus*, 4 Doug. 202 ; *Forbes v. Wale*, 1 W. Bl. 532 ; *Anon.* Cro. Jac. 429 ; *Cook v. Remington*, 6 Mod. 237 ; *Ward v. Apprice*, id. 264.

(*u*) *Tayloe v. Riggs*, 1 Peters, 591, 596 ; *Patterson v. Winn*, 5 Peters, 240, 242 ; *Riggs v. Tayloe*, 9 Wheat. 485 ; *Taunton Bank v. Richardson*, 5 Pick. 436, 442 ; *Poignard v. Smith*, 8 Pick. 278 ; *Page v. Page*, 15 Pick. 368, 374, 375 ; *Chamberlain v. Gorham*, 20 Johns. 144 ; *Jackson v. Frier*, 16 Johns. 193 ; *Douglass v. Sanderson*, 2 Dall. 116 ; 1 Yeates, 15, S. C. ; *Meeker v. Jackson*, 3 Yeates, 442 ; *Blanton v. Miller*, 1 Hayw. 4 ; *Seekright v. Bogan*, ib. 178, n.

(*x*) *Cobb v. Car*, cited B. N. P. 14 ; *Johnson v. Browning*, 6 Mod. 216, per Holt, C. J. ; *Jackson v. Bull*, 2 M. & Rob. 176, per Tindal, C. J., who there observes, "It would be very unjust if a party's own deposition were not evidence in his favour when charged with a malicious prosecution, inasmuch as it may happen that he has been the only witness in the case ; and the jury may have thought he had made a mistake in the identity, or in some other respect ; and if his own oath were not admissible, he would be handed over to such an action as this, bound hand and foot, without the possibility of defence."

witness, whose testimony went to show that the invention was not original (y).

§ 968. Besides these cases, which must be supported, if at all, on the ground of *necessity*, it will be proper to advert to a few old decisions both in Equity and at Law, where the oath of a party has been admitted, partly because his opponent had been guilty of *fraud* or *spoliation*, and partly because, from the necessity of the case and the nature of the subject, no other evidence could be expected. Thus, where a man ran away with a casket of jewels, he was ordered to answer in Equity, and the injured party's oath was allowed as evidence in *odium spoliatoris* (z); and on the same principle, Chancery, in a case of gross fraud, has given costs to be ascertained by the party's own oath (a). So, on a trial at law against a common carrier, where a question arose as to the things in a box, the party himself was allowed to be a witness *ex necessitate rei*; because, as the learned judge observed, "every one did not show what he put in his box" (b). It is certainly very questionable how far these cases would be recognised in this country at the present day, but it deserves notice that they have been recently sanctioned and acted upon by the Courts of the United States. Thus, where a shipmaster received on board his vessel a trunk of goods, to be carried to another port, but on the passage he broke open the trunk, and rifled it of its contents; in an action by the owner of the goods against the shipmaster, the plaintiff, proving *aliunde* the delivery of the trunk and its violation, was held competent as a witness to testify to its particular contents (c). And on the same principle, the bailor, though a plaintiff, has been admitted a competent witness to prove the contents of a box, lost by the negligence of the bailee (d).

(y) *Alden v. Dewey*, 1 Story, R. 336; 3 Law Reporter, 383, S. C.

(z) Anon. cited by the Lord Keeper, in *E. India Co. v. Evans*, 1 Vern. 308; *Childrens v. Saxby*, 1 Vern. 207; 1 Eq. Ab. Ca. 229, S. C.

(a) *Dyer v. Tymewell*, 2 Vern. 123.

(b) *Per Montague, B.*, cited in 12 Vin. Ab. p. 24, § 34.

(c) *Herman v. Drinkwater*, 1 Greenl. R. 27. See also *Sneider v. Geiss*, 1 Yeates, 34; *David v. Moore*, 2 Watts & Serg. 220.

(d) *Clark v. Spence*, 10 Watts, R. 335—337. In this case the doctrine in the text was fully expounded by Rogers, J., in the following terms. "A party is not

§ 969. Although in the instances given above parties to the record are *admissible* witnesses, it by no means follows, that they can therefore be *forced* to testify. For, independent of the rule which precludes such parties to the record as are directly interested in the dispute, from giving evidence in their own favour, there is another general rule, which declares that *no party to the record shall be compelled against his will to give testimony on behalf of*

competent to testify in his own cause; but like every other general rule, this has its exceptions. Necessity, either physical or moral, dispenses with the ordinary rules of evidence. In 12 Vin. 24, pl. 32, it is laid down, that on a trial at Bodmin, *coram* Montague, B., against a common carrier, a question arose, about the things in a box, and he declared that this was one of those cases, where the party himself might be a witness *ex necessitate rei*. For every one did not show what he put in his box. The same principle is recognised in decisions, which have been had on the Statute of Hue and Cry in England, where the party robbed is admitted as a witness *ex necessitate*. B. N. P. 181. So in *Herman v. Drinkwater*, 1 Greenl. R. 27, a shipmaster having received a trunk of goods on board his vessel, to be carried to another port, which on the passage he broke open and rifled of its contents; the owner of the goods, proving the delivery of the trunk and its violation, was admitted as a witness in an action for the goods, against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. That a party then can be admitted, under certain circumstances, to prove the contents of a box or trunk, must be acknowledged. But while we acknowledge the exception, we must be careful not to extend it beyond its legitimate limits. It is admitted *from necessity*, and perhaps on a *principle of convenience*, because, as is said in *Viner*, every one does not show what he puts in a box. This applies with great force to wearing apparel, and to every article which is necessary or convenient to the traveller, which in most cases are packed by the party himself or his wife, and which, therefore, would admit of no other proof. A lady's jewelry would come in this class, and it is easier to conceive than to enumerate other articles which come within the same category. Nor would it be right to restrict the list of articles, which may be so proved, within narrow limits, as the jury will be the judges of the credit to be attached to the witness, and be able in most cases to prevent any injury to the defendant. It would seem to me to be of no consequence, whether the article were sent by a carrier, or accompanied by the traveller. The case of *Herman v. Drinkwater*, I would remark, was decided under very aggravated circumstances, and was rightly ruled. But it must not be understood that such proof can be admitted merely because no other evidence of the fact can be obtained. For, if a merchant, sending goods to his correspondent, chooses to pack them himself, his neglect to furnish himself with the ordinary proof is no reason for dispensing with the rule of evidence, which requires disinterested testimony. It is not of the usual course of business, and there must be something peculiar and extraordinary in the circumstances of the case, which would justify the Court in admitting the oath of the party."

his opponent (e). This last rule is subject, indeed, to some exceptions, but these are in no way co-extensive with the exceptions that have just been discussed; and consequently, while on the one hand, a plaintiff or defendant cannot be forced to testify against his interest, merely because he is made a competent witness by statute (f), so, on the other, a party to the record, though entitled by the Legislature to appeal to the oath of his opponent, cannot be sworn on his own account (g).

§ 970. The rule itself seems to rest on the principle of preserving parties from all temptation to commit perjury, and such being its object, it has been commended by judges as "a rule founded in good sense and sound policy" (h). A question, however, may fairly be raised, as to whether, in theory or practice, it be entitled to such an encomium; because, in the first place, it does not remove the temptation to false swearing, for, being confined to the common law courts, either party to an action may still, by filing a bill of discovery, avail himself of the testimony of his opponent; and next, supposing that it had this effect, the advantages resulting therefrom would be far more than counterbalanced by the evil of shutting out the testimony of persons, who in general would be found most capable of giving correct information on the subject in dispute. The maxim, *nemo tenetur prodere seipsum*, may be a merciful one as applied to criminal trials, though even there its wisdom may well be doubted; but in civil proceedings it should surely have no place; unless men are prepared, both to adopt with deliberation the *hasty* assertion of the Psalmist, that "All men are liars," and to contend that suitors incur the penalties of perjury, for what, in most cases, would prove a very inadequate advantage, and at a risk, too, of detection, which must often be inevitable.

§ 971. Influenced by these or other considerations, the Legislature has, on one or two occasions, interposed, and set aside the

(e) *Worrall v. Jones*, 7 Bing. 399, per Tindal, C. J.; *R. v. Woburn*, 10 East, 395; *Fenn v. Granger*, 3 Camp. 177, per Lord Ellenborough.

(f) *R. v. Adderbury East*, 5 Q. B. 187, 195—197.

(g) *Conran v. Multony*, 1 Cawf. & Dix, Abr. Ca. 296; *Hawkesworth v. Hearson*, 2 Cawf. & Dix, Cir. R. 207, per Bushe, C. J.

(h) *Worrall v. Jones*, 7 Bing. 399, per Tindal, C. J.

rule under discussion. For instance, we have already seen (i), that, in the new County Courts, either party may be examined on oath, by his opponent; and the Act which regulates the proceedings of the Civil Bill Courts in Ireland contains a similar enactment (k). So, under the statutes relating to bankruptcy, the Commissioners are empowered to examine the bankrupt "touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, moneys, or debts" (l). Again, in actions against householders for damage done by rioters, or for the plundering of wrecks, the defendants are compellable by statute to give evidence on behalf of the plaintiff (m).

§ 972. With respect, also, to suits instituted in Chancery since the 22nd of August, 1843 (n), Lord Denman's Act recognises and sanctions a considerable relaxation of the rule in question, by providing, as before stated (o), "that in Courts of Equity, any *defendant* to any cause pending in any such Court, may be examined as a witness on the behalf of the *plaintiff*, or of any *co-defendant* in any such cause, saving just exceptions; and that any *interest*, which such defendant so to be examined may have in the matters, or any of the matters in question in the cause, shall *not be deemed a just exception to the testimony* of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

(i) Ante, § 962.

(k) 6 & 7 Will. 4, c. 75, § 36, enacts, "that both parties shall be mutually at liberty to appeal each to the oath of the other on the subject of the alleged cause of action; provided that a notice in writing be served on the party so intended to be examined, at least five days previous to the commencement of the sessions; but the assistant barrister may prevent and dispense with such appeal in such cases as he may think it expedient to do so." Under this section, parties cannot testify in their own favour, *Conran v. Multony*, 1 Crawf. & Dix, Abr. Ca. 296; *Hawkesworth v. Hearson*, 2 Crawf. & Dix, Cir. R. 207, per Bushe, C. J.

(l) 6 Geo. 4, c. 16, § 36. But the bankrupt must now make and sign a declaration instead of being sworn, 8 & 9 Vict. c. 48, § 1; post, § 1023. See also 8 & 9 Vict. c. 98, § 12, Ir.

(m) 7 & 8 Geo. 4, c. 31, § 5; 2 & 3 Will. 4, c. 72; 9 & 10 Vict. c. 99, § 44; post, § 979.

(n) When 6 & 7 Vict. c. 85, passed. § 3 enacts, that nothing in that Act shall apply to or affect any suit, action, or proceeding, brought or commenced before the passing of the Act.

(o) Ante, § 952.

To a certain extent this doctrine prevailed independent of the statute; but the main amendment in the former practice which has been effected by the Act, is, that defendants, *though interested*, may be examined as witnesses. There are, also, two other alterations of less importance, which appear to follow as corollaries from this change. First, it seems that a decree may now be made against a defendant, notwithstanding his examination (o); and, secondly, a plaintiff would probably now be allowed to examine a defendant, though he had replied to his answer, and had not withdrawn his replication (p). It is still, however, necessary to go through the superfluous form of obtaining an order as of course, for leave to examine a defendant, and the order is still drawn up in the old form, "saving just exceptions" (q). It may not be very easy to define the meaning of these last words, which are also found in the Act, as stated above, but perhaps they apply to such a case as *Langley v. Fisher* (r), where Lord Langdale decided, that a husband could not be examined against his wife in a suit affecting her separate estate. It is much to be regretted that, in amending the old practice, it was not thought expedient to abolish the distinction between plaintiffs and defendants in equity, and to render the former, equally with the latter, capable of being examined. The high authority of Sir Samuel Romilly, and of many other professional men of eminence, might be cited in support of such a change (s). At present, though a defendant in equity may be examined, with or without his consent, by the plaintiff, or by a co-defendant (t), at least where the two defendants have not one common defence (u), a plaintiff cannot be examined

(o) 1 Dan. Ch. Pr. 851.

(p) 1 Dan. Ch. Pr. 852. But see *Young v. English*, 7 Beav. 10; *Knight v. Morrell*, 14 Sim. 398, *Walker v. Jolly*, 22 R. 261 where held by Mr. R.

(q) *Legh v. Williams*, 8 Jurist, 29; cited 1 Dan. Ch. Pr. 853.

(r) 6 Beav. 443.

(s) Report on Ch. Pr. App. p. 54, Q. 266; id. p. 153, Q. 49; 1 Smith's Ch. Pr. 459, n. (1).

(t) *Ashton v. Parker*, 14 Sim. 632, where held, that although relief is prayed against a defendant, he may be examined as a witness by a co-defendant, against whom independent relief is prayed.

(u) Qu. Can the co-defendant be examined in support of a common case against the plaintiff? Bruce, V.-Ch., says he cannot, *Monday v. Guyer*, 11 Jurist, 861; Wigram, V.-Ch., with apparently more reason, thinks he can, *Wood v. Rowcliffe*, 11 Jurist, 709.

that the Replication must be withdrawn before the defendant can be examined & the defendant out.

by a defendant, except by consent, unless, perhaps, in the event of his being merely a trustee, or having no beneficial interest in the matter in question (*v*). Neither can a plaintiff be examined by a co-plaintiff, without the consent of the defendant (*w*). The course, in the latter of such cases, is to move for leave to strike out the name of the plaintiff required to be examined, and to make him a defendant, at the same time giving security for costs already incurred (*x*); and, in the former case, the practice is to file a cross bill (*y*). We may here add, that where issues are sent by Courts of Equity to a jury, the order not unfrequently contains a direction, that parties, as well plaintiffs as defendants, may be examined as witnesses (*z*).

§ 973. Returning now to the rule as recognised at common law, we shall find that it protects from compulsory examination, not only parties individually named on the record, but also all *persons* who are *substantially parties* to the suit (*a*). Thus, in ejectment on the several demises of two persons, though the title may be proved to be exclusively in one of them, the other lessor of the plaintiff cannot be compelled to testify on behalf of the defendant (*b*); and where a township was indicted for non-repair of a bridge, the declarations of the inhabitants were received in evidence for the Crown, on the ground that the inhabitants themselves, being substantially parties to the record, could not be *forced* to testify, though they were rendered *admissible* witnesses by statute (*c*). It has been held in America, that, if the party on the record be only a nominal party, the consent of the real party in interest must be obtained, before he can be examined (*d*). It has also

(*v*) 1 Dan. Ch. Pr. 848; Gresley Ev. 243; Hewatson v. Tookey, 2 Dick. 799.

(*w*) Id.

(*x*) Id.; Motteux v. Mackreth, 1 Ves. 142; Lloyd v. Makeam, 6 Ves. 145; Witts v. Campbell, 12 Ves. 493.

(*y*) Gresley Ev. 243. See Neilson v. McDonald, 6 Johns. Ch. 201; Souverbye v. Arden, 1 Johns. Ch. 240.

(*z*) Gresley Ev. 244; Rogerson v. Whittington, 1 Swanst. 39.

(*a*) R. v. Woburn, 10 East, 395; Mauran v. Lamb, 7 Cowen, 174; Appleton v. Boyd, 7 Mass. 131. See May v. Taylor, 6 M. & Gr. 266, per Maule, J.

(*b*) Fenn v. Granger, 3 Camp. 177.

(*c*) R. v. Adderbury East, 5 Q. B. 187; 3 & 4 Vict. c. 26; Plattskill v. New Paltz, 15 Johns. 305.

(*d*) Frear v. Evertson, 20 Johns. 142; The People v. Irving, 1 Wend. 20.

been there held that, though one of several co-plaintiffs should come *voluntarily* forward as a witness for the defence, his testimony cannot be received *without the consent* of his fellows (e) ; but this ruling is open to much doubt, and is also opposed to an English case, which, although indifferently argued, and badly reported, seems to have been correctly decided (f). Indeed, the admissibility of such testimony without, or even against, the consent of the other plaintiffs, would appear to rest safely on the grounds, that the party is testifying against his own interest, that the rule of protection is personal and several, and not mutual and joint, and that as his declarations out of court would be admissible, *a fortiori* they ought to be received, when made in court under oath.

§ 974. The SECOND CLASS OF INCOMPETENT WITNESSES includes the *lessor of the plaintiff* ; the *tenant* of premises sought to be recovered in *ejectment* ; the landlord or other *person in whose right any defendant* in replevin *makes cognizance* ; and, generally, *any person in whose immediate and individual behalf any action is brought or defended, either wholly or in part*. All such persons, being directly interested in the result of the inquiry, are, at common law, inadmissible witnesses in support of such interest, and are specifically excluded from the operation of Lord Denman's Act. Thus, in an action of ejectment, the lessor of the plaintiff being in fact the real plaintiff, cannot be called as a witness on behalf of John Doe, unless a verdict has been entered for the defendant on his demise (g) ; neither, in such an action, can the tenant in possession (h), or the person who stands in the situation of such tenant (i), though a competent witness for the plaintiff (k), give evidence for the defendant ; because the immediate effect of a verdict for the lessor

(e) *Scott v. Lloyd*, 12 Peters, 149.

(f) *Norden v. Williamson*, 1 Taunt. 377. In *Doe v. Thomas*, 1 M. & Gr. 339, one of several defendants, being called as a witness for the plaintiff, was rejected by the judge, but it does not appear by the report, whether the objection came from himself or from his co-defendants.

(g) *King v. Baker*, 2 A. & E. 339, per Lord Denman. Qu. also, whether his name must not have been used without his concurrence, *id.*

(h) *Doe v. Wilde*, 5 Taunt. 183 ; *Doe v. Tyler*, 6 Bing. 394, per Tindal, C. J. ; *Doe v. Bingham*, 4 B. & A. 672. (i) *Doe v. Birchmore*, 9 A. & E. 662.

(k) *Headly v. Connor*, Ir. Cir. R. 344 ; *Malone v. Spillissy*, *id.* 504, per Lefroy, B.

of the plaintiff would be to turn the witness out of possession. So, also, in replevin, no party under whom the defendant makes cognizance can be called for him, unless the cognizance be distinctly abandoned either before or at the trial (*l*); nor, perhaps, even then, if it appear that the witness is still interested in the result (*m*). It makes no difference in regard to this rule, that the person under whom cognizance is made, is a mere trustee for others (*n*).

§ 975. Thus far there is not much difficulty in interpreting the rule; but it is not so easy, in the absence of express decisions, to say what witnesses shall henceforth be rejected, as persons "in whose immediate and individual behalf any action is brought or defended, either wholly or in part." It has, indeed, been determined that, in an action against a sheriff for not arresting a party on a writ of *capias ad satisfaciendum*, the officer entrusted with the warrant is a competent witness for the defendant, though he has given the usual bond to the sheriff, provided he has not actually employed the attorney for the defence; for, in such case, the witness is not directly liable, either for the damage or the costs (*o*). So, a partner, against whom judgment has been obtained, may, in a subsequent action against his co-partner for the same debt, where there is no plea in abatement, and the former judgment is not pleaded in bar, testify on behalf of the plaintiff, though the effect of a verdict against the defendant may relieve the witness from part, if not from the whole, of the consequences of the former judgment (*p*). So the mere fact of a vendor having covenanted

(*l*) *King v. Baker*, 2 A. & E. 333; 4 N. & M. 228, S. C. In *Girdlestone v. McGowran*, 1 C. & Kir. 702, where, in replevin, the defendants made cognizance, first, as bailiffs of A. & B., and next, as bailiffs of A., Alderson, B., after consulting Lord Denman, rejected B., who was called to support the second cognizance, though the defendant gave no evidence to prove the first, and offered to abandon it. The case of *King v. Baker* was however not cited, and as the defendants obtained a verdict, no opportunity occurred for reviewing the decision. Its correctness admits of much doubt.

(*m*) *Upton v. Curtis*, 8 B. Moore, 52; 1 Bing. 210, S. C., cited and explained in *King v. Baker*, 2 A. & E. 340.

(*n*) *Golding v. Nias*, 5 Esp. 272, per Chambre, J., cited and explained in *King v. Baker*, 2 A. & E. 340.

(*o*) *Wilson v. Magnay*, 1 C. & Kir. 291, per Parke, B.; *Wheeler v. Senior*, id. 293, per Wightman, J.

(*p*) *Cupper v. Newark*, 2 C. & Kir. 24, per Tindal, C. J.

for a good title, will not render him an incompetent witness in an ejectment brought for the premises by the purchaser (*q*). So, a bankrupt is a competent witness for his assignees, in an action brought by them against parties claiming under an execution, to prove that the defendants had notice of a prior act of bankruptcy; as also, it would seem, to prove the petitioning creditor's debt, the act of bankruptcy, or any other fact tending to support the commission (*r*). So, where a ship-broker brought an action for commission, a party who had introduced him to the defendant, and who, by the custom of the trade, was in consequence entitled to claim from the broker a moiety of the commission, was held to be a competent witness for the plaintiff, as he could derive no immediate benefit from a judgment against the defendant, his only resource being an action against the plaintiff on his own implied contract (*s*). So, in an action against a part-owner of a ship upon a charterparty made by him alone, another part-owner, who does not authorise the defence, is a competent witness for the defendant, if not at common law, at least under one or both of the late statutes (*t*).

§ 976. Again, in an action by the payee against one of the makers of a joint and several promissory note, another of the makers is a competent witness for the defendant, to support a plea of payment (*u*). So, in trover for a promissory note, where the defendant pleaded, that the note had been fraudulently obtained from one Mytton, and wrongfully delivered to the plaintiff, whereupon he, as Mytton's agent, took the note out of the plaintiff's possession, the Court held, that Mytton, who swore on the voir dire, that he had not indemnified the defendant, and had nothing to do with the action, was a competent witness to prove that the note was his own property (*x*). So, where a lady, who was the payee of a promissory note payable with interest, married, and

(*q*) See *Doe v. Howells*, C. & Marsh. 648. See *Barker v. Birch*, 6 M. & Gr. 307, where held, that, at common law, the occupier of a farm was a competent witness for the owner, on an issue whether the farm was covered by a modus.

(*r*) *Udal v. Walton*, 14 M. & W. 254.

(*s*) *Hill v. Kitching*, 2 C. & Kir. 278, per Tindal, C. J.

(*t*) *Atkinson v. Foster*, 1 Com. B. 712.

(*u*) *Russell v. Blake*, 2 M. & Gr. 374; 2 Scott, N. R. 574, S. C.

(*x*) *Hearne v. Turner*, 2 Com. B. 535.

afterwards died in the lifetime of her husband, it was held, that in an action on the note by her administrator, the husband was a competent witness for the plaintiff to prove the payment of interest, so as to answer a plea of the Statute of Limitations; the receipt of the interest by the husband being considered by the Court as not amounting to a reduction of the note into possession, and he being entitled to the separate estate of his wife, only in the event of its being more than sufficient to discharge the debts contracted by her before the marriage (*y*). Hence it seems to follow, that a residuary legatee might be examined on behalf of an executor, who was either bringing an action against a debtor, or defending an action against a creditor, of the testator, or that the widow, or next of kin of an intestate might be called by the administrator or the executor *de son tort* under similar circumstances. On the other hand, if a broker after effecting an insurance of his principal's goods in his own name, were to bring an action on the policy, the principal, as it seems, would still be an inadmissible witness for the plaintiff; at least in the absence of distinct proof, that the action was not brought by his authority, or for his benefit (*z*). Perhaps, in cases of this nature, the question, on which the competency of a witness mainly turns, is, whether he has authorised, expressly or impliedly, the commencement or defence of the action, and whether, in point of fact, he has rendered himself, in any way, directly responsible for the costs (*a*).

§ 977. With respect to the competency of *attesting witnesses to wills* and of *executors*, there is less difficulty, as the provisions of the New Will Act (*b*), which are left untouched by Lord Denman's Act (*c*), are explicit on this subject. They enact, first, "that, if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted as a witness to prove the execution thereof, such will shall not on that account be invalid;"—next, "that if any person shall attest the execution of any will, to whom, or to whose

(*y*) *Hart v. Stephens*, 6 Q. B. 937.

(*z*) See *Bell v. Smith*, 5 B. & C. 188; *Smith v. Lyon*, 3 Camp. 465.

(*a*) See *Jacobs v. Layborn*, 11 M. & W. 685; *Bloor v. Davies*, 7 M. & W. 235; *Baker v. Tyrwhitt*, 4 Camp. 27; *Yardley v. Arnold*, 10 M. & W. 141; *C. & Marsh*. 434, S. C.

(*b*) 7 Will. 4 & 1 Vict. c. 26, §§ 14—17.

(*c*) *Ante*, § 952.

wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment, mentioned in such will;”—next, “that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof;”—and lastly, “that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.” We have already seen, that, under the Small Debts’ Act, every person is liable to be examined as a witness in the County Courts, whether the action be brought or defended in his behalf or not (*d*).

§ 978. Returning now to Lord Denman’s Act, it is difficult to state, *à priori*, whether, in the event of an action being brought by or against a *corporation*, or other similar collective body, each individual member would be considered by the Court, as falling within the exception under discussion. But we apprehend, that, in general, he would not be so regarded; because, although, in ordinary cases, he might have some interest in the result, or even be liable in some form or other to pay his quota of the costs, the interest would seem to attach to his *corporate* or collective *capacity*, and consequently it could scarcely be said that the action was brought or defended, even in part, on his immediate and *individual*

(*d*) Ante, § 962, 9 & 10 Vict. c. 95, § 83.

behalf. If, however, the Court should determine, that all such witnesses were within the exception, it would by no means follow that they were therefore incompetent to testify; for, by the common law, individual corporators or shareholders were only inadmissible witnesses in actions brought by or against the corporation or company, provided they had some individual interest in the question in dispute, or were, at least, personally liable for the costs (e).

§ 979. Moreover, the Legislature has, in some instances, expressly interposed, to render parties, who are collectively sued, individually competent as witnesses. Thus, if an action be brought against the inhabitants of a hundred or other the like district, to recover compensation for damage done by rioters, or for the plundering of wrecked vessels by tumultuous assemblies, the statutes, which authorise the action, directly provide, that no inhabitant "shall, by reason of any interest arising from such inhabitancy, be exempted or precluded from giving evidence either for the plaintiff or for the defendants" (f). So, the Act relating to Friendly Societies, provides (g), that "on the trial of any action, indictment or other proceeding respecting the property of any [such society duly enrolled], or in any proceedings before any justice of the peace, any member of such society shall be a competent witness, and shall not be objected to on account of any interests he may have, as such member, in the result of such action, indictment, or other proceeding." The Act, too, of 3 & 4 Vict. c. 26, enacts (h), in general terms, that "no person called as a witness on any trial in any court whatever may and shall be disabled or prevented from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed or liable to be rated or assessed to the relief of the poor, or for or towards the maintenance of church, chapel, or highways, or for any other purpose whatever."

(e) See *Weller v. Governors of Foundling Hospital*, Pea. R. 153; *Bailiffs of Godmanchester v. Phillips*, 4 A. & E. 550; 6 N. & M. 211, S. C.; *Collyer v. Stennett*, 4 M. & Gr. 696, 697; *Doe v. Tooth*, 3 Y. & Jer. 19; *Needham v. Law*, 12 M. & W. 560; *Fletcher v. Greenwell*, 1 C. M. & R. 754; 5 Tyr. 316, S. C.; *M'Gahey v. Alston*, 2 M. & W. 206.

(f) 7 & 8 Geo. 4, c. 31, § 5; 2 & 3 Will. 4, c. 72; 9 & 10 Vict. c. 99, § 44.

(g) 4 & 5 Will. 4, c. 40, § 10.

(h) § 1.

§ 980. A further question may, perhaps, arise, as to whether any witness can be objected to on the ground of being a person, on whose immediate and individual behalf the suit or defence is instituted, unless the objection be taken on the trial of *an action at Nisi Prius, or at bar*. And, here, it would seem to be tolerably clear, that, as the whole scope of Lord Denman's Act is to transmute the question of *competency* into a question of *credibility*, the language employed in the exceptive clause should be construed strictly; and that therefore, the word "*action*," which alone is found in the passage cited above, should be confined to its literal meaning. This would appear to be all the more necessary, as the draftsman evidently well understood the distinction between an action and a suit or other proceeding whether civil or criminal; having employed these terms very properly in other parts of the Act. If, then, the interpretation of the passage in question be so limited, no objection to the competency of any witness, who is examined in a Chancery suit (*h*), or is called on the trial of an appeal at the sessions, can be sustained, simply on the ground, that the proceeding is either instituted or defended on his immediate and individual behalf. Nor can the testimony of any prosecutor in a criminal trial, or of any complainant or informer in any summary proceedings, be any longer rejected on this ground.

§ 981. As, however, it is still doubtful, whether the construction here contended for will be ultimately adopted, it becomes expedient, as in treating of parties on the record, to notice briefly a few exceptions, which either by statute or otherwise have been engrafted on the rule of exclusion, supposing it still to extend to *all* persons, on whose immediate and individual behalf any *legal or equitable proceedings* are instituted or defended. And here it must first be noticed, that, on the trial of indictments or criminal informations, the prosecutor or party injured is in general not an incompetent witness at common law, because the proceedings are instituted in the name of the Crown, and on the behalf of the public, and their

(*h*) It is worthy of remark that §§ 26 & 27 of 3 & 4 Will. 4, c. 42, have been held inapplicable to Courts of Equity, *Oliver v. Latham*, 1 Phill. 408, 420, 421, per Lord Lyndhurst, C., overruling a former decision of his own to the contrary, in S. C. reported 1 Phill. 163.

object is not the reparation of individual injury, but the satisfaction of public justice (*i*). Moreover, as a witness for the Crown in a criminal prosecution can, in no case, use the verdict as evidence in any subsequent civil proceeding, it is obvious that a prosecutor cannot be rendered incompetent to testify, on the supposed ground of an indirect interest in the verdict (*k*). Formerly an anomalous rule prevailed in cases of forgery, the party, upon whom the forgery was alleged to have been committed, being an inadmissible witness in support of the prosecution; but in 1828 the legislature interposed, and rendered such witness competent (*l*).

§ 982. Still, if the prosecutor has a direct and certain interest in the event of a criminal trial, as, for instance, is the case upon a statutable indictment for a forcible entry (*m*), where the tenant is entitled, upon the conviction of the defendant, to the immediate restitution of his lands, it may perhaps be urged, that he is a person in whose immediate and individual behalf the prosecution is in part brought, and as such, that he is an inadmissible witness for the Crown. We do not think this argument would prevail, because, as we have just observed, the object of an indictment is to satisfy public justice, and to deter offenders from committing crimes by the wholesome fear of punishment; and we regard the restitution of the property seized, or other reparation to the party injured, as a mere *accident*, in no way varying the nature of the proceeding, which still remains an inquiry instituted by the Crown on behalf of the public alone.

§ 983. If, however, we are again wrong in forming this opinion, then, on the trial of a statutable indictment for a forcible entry (*o*),

(*i*) 1 Ph. Ev. 61.

(*k*) *R. v. Boston*, 4 East, 572; 1 Ph. Ev. 62; 3 & 4 Will. 4, c. 42, §§ 26, 27. This Act, like Lord Denman's, uses the word "action" alone, but we are now arguing on the assumption, that this word in the latter Act will be construed to include any civil or criminal proceeding; and, of course, the two Acts being in *pari materiâ*, they must receive the same interpretation. See *ante*, § 950.

(*l*) 9 Geo. 4, c. 32, § 2.

(*m*) Under 21 Jac. 1, c. 15, or 8 Hen. 6, c. 9.

(*o*) *R. v. Williams*, 9 B. & C. 549; *R. v. Beavan*, Ry. & M. 242.

and perhaps in a few other criminal trials, the prosecutor will be an inadmissible witness; though, on most occasions, his disability is removed, independent of Lord Denman's Act, either by the express provision or necessary implication of the particular statute conferring the interest, or on some strong ground of public policy. Thus, the owner of stolen goods is a competent witness against the thief or receiver, although, on obtaining a conviction, he is entitled to restitution under the Act of 7 & 8 Geo. 4, c. 29, § 57; because, as this enactment was passed in order "to encourage the prosecution of offenders," and as, moreover, the old Act of 21 Hen. 8, c. 11, expressly recognised the owner as a competent witness (*p*), it is obvious that if he were held incompetent, prosecutions, so far from being encouraged, would be greatly impeded.

§ 984. Again, there are a variety of cases in which *informers*, or the *inhabitants* of a district, are entitled to the whole or part of a *penalty on the conviction* of an offender, whether he be tried on an indictment or information, or be dealt with in a summary way by justices, commissioners, or other authorised persons. Here, if the penalty be only recoverable by a separate action, the person who is to receive it is clearly a competent witness for the prosecution, since the conviction would be no evidence for him in the subsequent suit (*q*); and even if the penalty be immediately payable, there are but few cases in which the incompetency of the witness is not removed by statute. Thus, under the excise laws, it is provided (*r*), "that upon the trial or hearing of any information or other legal proceeding for the recovery of any penalty incurred, or for the condemnation of any goods commodities or chattels, seized as forfeited under any Act relating to the revenue of excise, any officer of excise, or any other person, who shall or may be entitled to the whole or any share of such penalty or of such seizure, shall be admitted by the Court in which, or the commissioners or the justices before whom, such information shall be tried or heard, to give evidence upon such information, and shall be deemed and taken to be a competent witness upon such trial or hearing, notwithstanding any such interest as aforesaid." So,

(*p*) *R. v. Williams*, 9 B. & C. 550, per Parke, J.; 557, per Bayley, J.

(*q*) *Id.* 557—559, per Bayley, J.

(*r*) 7 & 8 Geo. 4, c. 53, § 75.

under the laws relating to the customs (s), every officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information, on account of any seizure or penalty under those laws, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information. Again, the Statute of 27 Geo. 3, c. 29, enacts, that the inhabitants of every parish, township, or place, shall be competent witnesses for the purpose of proving the commission of any offence within the limits of such parish, township, or place, notwithstanding the penalty incurred by such offence, or any part thereof, may be applicable to the poor of such parish, township, or place, or otherwise for the benefit or use, or in aid or exoneration of, such parish, township or place, provided such penalty shall not exceed the sum of 20*l*. So, also, in the case of summary convictions under the Statutes 7 & 8 Geo. 4, c. 29, and 7 & 8 Geo. 4, c. 30, which respectively relate to the unlawful taking and malicious injury of property, "the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division, in which the offence shall have been committed, notwithstanding any forfeiture or penalty incurred by the offence may be payable to the general rate of such county, riding, or division." (t). The Municipal Corporation Act also provides (u), "That no person, although liable to the rate contributing to the borough fund of any borough, shall be deemed an incompetent witness in proof of any offence against this Act, by reason of any penalty or forfeiture for such offence being applicable to the use of such borough fund."

§ 985. The THIRD GENERAL RULE OF EXCLUSION, subject to some exceptions which will be presently mentioned, precludes a *husband* or *wife* from giving testimony in any cause, civil or criminal, in which the other is a party (x). They cannot be witnesses for each

(s) 8 & 9 Vict. c. 87, § 132.

(t) 7 & 8 Geo. 4, c. 29, § 64; 7 & 8 Geo. 4, c. 30, § 29.

(u) 5 & 6 Will. 4, c. 76, § 128.

(x) *Davis v. Dinwoody*, 4 T. R. 678; *Bentley v. Cooke*, 3 Doug. 422; *Parker v. Dixie*, Cas. tem. Hardw. 264. The same rule prevails in equity, *Sedgwick v.*

other, because their interests are identical, neither can they testify against each other, because the admission of such testimony would lead to dissension and unhappiness, and possibly to perjury (*y*). It is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly cherished; and to impair the great principles which protect the sanctity of that relation, would be to destroy the best solace of human existence (*z*). Such are the reasons usually given by the Judges, and adopted by the text writers, for excluding the testimony of married persons for or against each other; and probably these reasons sufficiently explain the rule for most practical purposes, though it would appear, on close examination, that they are not strictly accurate, and do not embrace all the cases that are governed by the rule. Thus, the ground of exclusion which depends upon identity of interest, is obviously too narrow, since, in an action brought by the trustees of a wife against the sheriff, for seizing under an execution against the husband goods that were settled to her separate use, the husband cannot be called by the plaintiffs to prove the identity of the goods, though his interest in such case might be diametrically opposed to that of his wife; and if the property could not have been taken to satisfy his debt, he would still be liable to pay it afterwards (*a*). On the other hand, the second ground which rests on the sacredness of conjugal communications is too large, since it would exclude all such communications, even where married persons were witnesses in actions between strangers; whereas it is notorious, that in these cases a wife might be called to prove, that on a certain occasion she had acted with the consent or by the authority of her husband (*b*), and where the husband has been previously examined, she has even been asked whether he deserved to be believed upon his oath (*c*).

Watkins, 1 Ves. 49; *Vowles v. Young*, 13 Ves. 144; and in Scotland, *Alison Pract.* 461. See also 2 Kent, Com. 179, 180; *Com. v. Marsh*, 10 Pick. 57; *Robbins v. King*, 2 Leigh's R. 142, 144; *Snyder v. Snyder*, 6 Binn. 488; *Corse v. Patterson*, 6 Har. & Johns. 153. See ante, § 691.

(*y*) *B. N. P.* 286; 2 St. Ev. 549; Co. Lit. 6 b; *O'Connor v. Marjoribanks*, 4 M. & Gr. 443, per Tindal, C. J.

(*z*) *Stein v. Bowman*, 13 Peters, 223, per M'Lean, J.

(*a*) *Davis v. Dinwoody*, 4 T. R. 678.

(*b*) *O'Connor v. Marjoribanks*, 4 M. & Gr. 440, per Maule, J.

(*c*) *Annesley v. E. of Anglesea*, 17 How. St. Tr. 1276.

§ 986. This rule not only excludes witnesses who are called to give evidence of what occurred during their marriage with parties to the suit, but it prevents their being examined, either as to circumstances that happened *before* the marriage, or even as to the very *fact* of the *marriage* itself. Thus, where one of the plaintiff's witnesses, after she was actually subpoenaed to testify in the suit, married the defendant, she was held incompetent to give evidence (*d*); and it is undoubted law that, in prosecutions for bigamy, neither the first husband nor wife can be called to prove their marriage with the defendant (*e*). The same rule prevails in civil proceedings, and therefore, where, to an action of debt, a woman pleaded coverture, the Court held that her husband was an incompetent witness to support the plea (*f*). It has even been decided that, where a married woman brought an action as a feme sole, her husband could not be called by the defendant to prove coverture, and thus to nonsuit the plaintiff (*g*). In this case, Mr. Justice Buller first entertained some doubts, as it was obvious that, in proving the marriage, the witness was speaking against his interest; but he at length yielded to the general abstract rule, which must now be considered as clearly established, though it is difficult, if not impossible, to refute the argument of the defendant's counsel, who urged that the objection to the evidence of the husband could not be stated without being thus answered:—"You reject the witness because he is the plaintiff's husband. If he is the plaintiff's husband, she cannot maintain the action."

§ 987. This rule is not confined to cases where the fact or communication sought to be given in evidence is of a confidential character, but its great object is to secure domestic happiness by

(*d*) *Pedley v. Wellesley*, 3 C. & P. 558, per Best, C. J.

(*e*) *Grigg's case*, T. Raym. 1; 1 Hale, 693; 1 Russ. C. & M. 218.

(*f*) *Woodgate v. Potts*, 2 C. & Kir. 457, per Parke, B.

(*g*) *Bentley v. Cooke*, 3 Doug. 422; S. C., cited 2 T. R. 265, 269. In this case, the Court took no notice of the *admission* contained in the objection, and perhaps on this ground the decision is subject to some doubt. In the Ecclesiastical Courts it has been contended that, in a suit of nullity of marriage, on the ground of a previous marriage subsisting between the wife and another party, the first husband was an admissible witness against the wife, because, by objecting to his testimony, she would convict herself of bigamy. The Court in that case permitted the evidence to be read *de bene esse*, but the point was not solemnly decided. See *Searle v. Price*, 2 Hagg. Cons. R. 187, (*n*).

placing the protecting seal of the law upon *all* communications between husband and wife; and therefore, in an action of trover, brought by the personal representatives of a deceased husband, it has been held that the widow cannot be called by the defendants, to show that she had pledged the goods with them by her husband's authority, though the fact of her agency was not in the nature of a confidential communication, and though the effect of her evidence would have decreased her late husband's estate, and consequently would have operated against her own interest (*h*).

§ 988. The case just cited is also of value, as it establishes the important doctrine that it is *immaterial* whether the relation of husband and wife be *still subsisting* at the time when the evidence is required to be given; but that whatever has come to the knowledge of either party by means of the hallowed confidence which that relation inspires, cannot be afterwards divulged in testimony, even though the other party be no longer living (*i*). So, where a woman, who had been divorced by Act of Parliament, and had married another person, was offered as a witness against her former husband, to prove a contract which he had made during the coverture, Lord Alvanley held her clearly incompetent, adding with his characteristic energy, "it never shall be endured, that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved" (*k*).

§ 989. As this rule is, in some respects, analogous to that which excludes confidential communications made by a client to his legal adviser (*l*), it has been held in America, and probably would

(*h*) O'Connor v. Marjoribanks, 4 M. & Gr. 435.

(*i*) *Id.*, overruling Beveridge v. Minter, 1 C. & P. 364, and confirming Monroe v. Twisleton, Pea. Add. C. 219. See also Doker v. Hasler, Ry. & M. 198, per Best, C. J.

(*k*) Monroe v. Twisleton, Pea. Add. C. 221; explained and confirmed by Lord Ellenborough in Aveson v. Lord Kinnaird, 6 East, 192, 193. See also Terry v. Belcher, 1 Bail. R. 568, that the rule excludes the testimony of a husband or wife separated from each other under articles. See further, Stein v. Bowman, 13 Peters, 209, 223; The State v. Jolly, 3 Dev. & Bat. 110.

(*l*) As to which, see ante, § 660, et seq.

be considered the law here, that a wife, after the death of her husband, may prove facts coming to *her knowledge from other sources*, and not by means of her situation as a wife, notwithstanding they related to the transactions of her late husband (*m*).

§ 990. The principle of this rule requires its application to all cases in which the interests of a married person, who is a party to the record, are involved, and therefore a wife cannot be witness for a *co-defendant*, if her testimony, as in the case of a conspiracy, would tend directly to her husband's acquittal (*n*). This doctrine has been carried to such a length, that where the wife of one prisoner was called to prove an alibi in favour of another jointly indicted with her husband for burglary, her testimony was rejected on the ground, that, by shaking the evidence of a witness for the prosecution who had identified both prisoners, it would materially weaken the case against the husband (*o*); and in an action of trespass against two parties for taking the plaintiff's goods, the wife of one of them was held incompetent to prove that the other did not authorise the seizure, though the case against the husband was clearly established; for as the learned judges observed, if the wife was once sworn, she was bound to give evidence of all the matters in dispute, and therefore could not be restrained from speaking as to facts, which might tend to exonerate her husband (*p*).

§ 991. As the courts will recognise no distinction between admitting the evidence of married persons for or against each other (*q*), a husband has been deemed an inadmissible witness in support of a prosecution, which charged his wife and several other persons with conspiring to procure his marriage without the

(*m*) *Coffin v. Jones*, 13 Pick. 445; *Williams v. Baldwin*, 7 Verm. 506; *Wells v. Tucker*, 3 Binn. 366.

(*n*) *R. v. Locker*, 5 Esp. 107, per Lord Ellenborough.

(*o*) *R. v. Smith*, 1 Moo. C. C. 289. See also *R. v. Hood*, id. 281; *R. v. Frederick*, 2 Str. 1095.

(*p*) *Hawkesworth v. Showler*, 12 M. & W. 45. See *Coffey v. Burriss*, 7 Ir. Law R. 509, 512, 513.

(*q*) *R. v. Perry*, per Gibbs, C. J., cited and approved of by Abbott, C. J., in *R. v. Serjeant*, Ry. & M. 354.

consent of his parents (*r*); and where four men were indicted for sheep stealing, Mr. Baron Bolland rejected the testimony of the wife of one of them, who was called to prove facts against the other prisoners (*s*).

§ 992. But though the rule of exclusion is thus stringent where a married person is civilly charged or criminally accused in conjunction with others, it is clear that where a married defendant is entirely removed from the record, whether by a judgment by default, or by a verdict pronounced in his favour, or by a previous conviction, or by the jury not being charged with his interest at the time of the trial, his wife may testify either for or against any other persons who may be parties to the record (*t*); and the mere hope that, by giving evidence against a prisoner, a wife may procure the pardon of her husband who has been previously convicted of another crime, will by no means affect her competency, though it may and indeed must shake her credit (*u*).

§ 993. Where the husband or wife, though not a party to the record, is a person in whose immediate and individual behalf the action is brought or defended, either wholly or in part, and is therefore incompetent to testify, the other also is incompetent (*x*). Thus, the husband or wife of a lessor of the plaintiff, or of the tenant in ejectment, or of the person in whose right a defendant in replevin makes cognizance, cannot be examined (*y*). Neither can a husband be a witness for the trustees of his wife in a question touching her separate estate (*z*). But the wife of a prosecutor is a

(*r*) *R. v. Serjeant, Ry. & M.* 352.

(*s*) *R. v. Webb*, 2 Russ. C. & M. 982. See 1 Hale, 301.

(*t*) *Hawkesworth v. Showler*, 12 M. & W. 49, 50, per Alderson, B.; *R. v. Williams*, 8 C. & P. 284, per id., who stated that, in Thurtell's case, Mrs. Probert was examined as the principal witness against Thurtell, after her husband was acquitted.

(*u*) *R. v. Rudd*, 1 Lea. C. C. 127.

(*x*) 6 & 7 Vict. c. 85, § 1, cited ante, § 952. See also *Coffey v. Burriss*, 7 Ir. Law R. 509, where the Irish Exchequer Chamber held, that whenever a man was an incompetent witness as being interested, his wife was also incompetent.

(*y*) Id.

(*z*) *Davis v. Dinwoody*, 4 T. R. 678; 1 Burr. 424, per Lord Mansfield; *Snyder v. Snyder*, 6 Binn. 483. See further as to husband or wife attesting a will under

competent witness either for the Crown or for the defence (a); and it would seem that the wife of a bankrupt might be called by his assignees to prove his bankruptcy; for, although the bankrupt may have some indirect interest in the sum sought to be recovered, inasmuch as after payment of his creditors he will be entitled to any residue that may be found to exist, yet he can scarcely be deemed a person in whose immediate and individual behalf his assignees have brought the action.

§ 994. This rule of exclusion is extended only to *lawful marriages*, or at least to such as are innocent in the eye of the law. Thus, upon a trial for bigamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, is a competent witness either for or against the prisoner; for the second marriage is void (b). But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted (c). Whether a man can call as a witness a woman with whom he has long cohabited, whom he has constantly *represented to be his wife*, and by whom he has had children, has been declared to be at least doubtful (d). Lord Kenyon rejected such a witness when offered by the prisoner, in a capital case tried before him at Chester (e); and in a later case, in which an arbitrator rejected a witness similarly situated, the Court, abstaining from any opinion as to her competency, confirmed the award, on the ground that the law and fact had both been submitted to the arbitrator (f). It

which one of them takes an interest, ante, § 977; and as to their admissions or declarations, ante, §§ 543—547; and as to their letters, ante, § 544; and as to wife testifying to secret facts, ante, § 691.

(a) *R. v. Houlton*, Jebb, C. C. 24.

(b) B. N. P. 287; *R. v. Serjeant*, Ry. & M. 354, per Abbott, C. J.

(c) *Griggs's case*, T. Raym. 1. But it seems, that the wife, though inadmissible as a witness, may be *produced* in court for the purpose of being *identified*, although the proof thus furnished may affix a criminal charge upon the husband; as, for example, to show that she was the person to whom he was first married; or, who passed a note, which he is charged with having stolen. *Alison's Pr.* 463.

(d) *Campbell v. Twemlow*, 1 Price, 88, 89, per Thompson, C. B.

(e) Anon. cited by Richards, B., in 1 Price, 83.

(f) *Campbell v. Twemlow*, 1 Price, 81, 88, 90, 91. Richards, B., observed, that he should certainly have done as the arbitrator did. To admit the witness

should, however, be observed, that in the case tried by Lord Kenyon, the criminal had, *throughout the trial*, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned; and in the subsequent case of *Batthews v. Galindo (g)*, where Lord Kenyon's ruling was discussed, Park and Burrough, Js. declared that his Lordship's decision was founded on this admission, and the whole Court determined that a kept mistress was a competent witness for her protector, though she passed by his name, and appeared to the world as his wife. So, where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation (*h*). It seems, also, from this last case, and from several others (*i*), that a supposed husband or wife may, both in civil and criminal cases, be examined on the *voir dire* to facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony (*k*).

§ 995. Whether the rule may be relaxed so as to admit the wife to testify against the husband *by his consent*, the authorities are not agreed. Lord Hardwicke was of opinion that she was not admissible, even with the husband's consent (*l*); and this opinion

in such a case would both encourage immorality, and enable the parties at their pleasure to perpetrate fraud, by admitting or denying the marriage, as may suit their convenience. See *Divoll v. Leadbetter*, 4 Pick. 220.

(*g*) 4 Bing. 610, 612, 613; 3 C. & P. 238, and 1 M. & Pay. 565, S. C.

(*h*) *Wells v. Fletcher*, 5 C. & P. 12, per Patteson, J.; S. C. nom. *Wells v. Fisher*, 1 M. & Rob. 99, and n.

(*i*) *R. v. Peat*, 2 Lew. C. C. 288; *R. v. Wakefield*, id. 279; 1 Russ. C. & M. 218, n. (*l*).

(*k*) *R. v. Bramley*, 6 T. R. 330; *R. v. Bathwick*, 2 B. & Ad. 646, where Lord Tenterden observed, that "it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called."

(*l*) *Barker v. Dixie*, Cas. temp. Hardw. 264.

has been followed in America (*t*), apparently upon the ground, that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. The very great temptation to perjury, in such case, is not to be overlooked (*u*). But Lord Chief Justice Best, in a case before him (*x*), said he would receive the evidence of the wife if her husband consented; apparently regarding the interest of the husband as the sole ground of her exclusion, since he cited a case where Lord Mansfield had once permitted a plaintiff to be examined with his own consent.

§ 996. Though, in the instances before mentioned, the husband and wife are inadmissible as witnesses for or against each other, yet, in all other cases, they may be called, though the evidence of the one may *tend* to subject the other to a *legal demand*, or even to a *criminal charge*. Thus, a wife may be a witness to excuse a party sued from a supposed liability, although the effect of her testimony is to charge her husband upon the same debt, and so to render him liable to a subsequent action (*y*); and in a question respecting a female pauper's settlement, where a man testified that he was married to the pauper, another woman was admitted to prove her own previous marriage with the same man; for although, if the testimony of both witnesses was true, the husband was chargeable with the crime of bigamy, yet neither the evidence nor the record in that case, would be receivable against him upon such a charge, the point at issue being *res inter alios acta*, and neither the husband nor the wife having any interest in the decision (*z*). So, it would seem, that, in an action by the indorsee against the

(*t*) Randall's case, 5 City Hall Rec. 141, 153, 154; Colbern's case, 1 Wheeler's C. C. 479.

(*u*) Davis v. Dinwoody, 4 T. R. 679, per Lord Kenyon.

(*x*) Pedley v. Wellesley, 3 C. & P. 558.

(*y*) Griffin v. Brown, 2 Pick. 308, per Parker, C. J. See Williams v. Johnson, 1 Stra. 504; B. N. P. 287 a; Fitch v. Hill, 11 Mass. 286; Baring v. Reeder, 1 Hen. & Mun. 154, 168, per Roane, J.

(*z*) R. v. Bathwick, 2 B. & Ad. 639, 647; R. v. All Saints, Worcester, 6 M. & Sel. 194. These cases overrule the case of R. v. Cliviger, 2 T. R. 263, where it was broadly held, that a wife was in every case incompetent to give evidence, *tending* to criminate her husband.

acceptor of a bill of exchange, the wife of the drawer might be permitted to prove that her husband had forged the bill (a); though, subsequently to the decision of *R. v. Bathwick*, two learned judges are reported to have held, that, on an indictment for theft, a woman could not be called on the part of the Crown, to prove that her husband, who had absconded, was present when the property was taken, and that she saw him deliver it to the prisoner (b).

§ 997. But although, in these cases, the wife will be *permitted* to testify against her husband, it by no means follows that she will be *compelled* to do so; and the better opinion is that she may throw herself upon the protection of the Court, and decline to answer any question, which would tend to expose her husband to a criminal charge (c).

§ 998. Whether, in collateral proceedings between third parties, a husband and wife would be permitted to *contradict* each other, has not, in England, been expressly decided; but the leaning of the Courts is evidently in favour of their admissibility for such a purpose (d). Indeed, if this were not the law, great injustice might be done; since the competency of the witness would then depend upon the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstance of his wife having been previously called on the part of the plaintiff, though, had the defendant been entitled to begin, the husband would have been examined, and the wife rejected. In Ireland it has been held by all the judges, that it is no objection to the evidence of a wife, that she is brought to contradict the testimony of her husband, even where he is the prosecutor of an indictment (e).

(a) *Henman v. Dickinson*, 5 Bing. 183; 2 M. & P. 282, S. C. In this case the point was not expressly decided.

(b) *R. v. Gleed*, 2 Russ. C. & M. 983, per Taunton and Littledale, Js. Sed qu.

(c) *R. v. All Saints, Worcester*, 6 M. & Sel. 200, per Bayley, J.

(d) 2 B. & Ad. 646, per Lord Tenterden; 6 M. & Sel. 198, per Lord Ellenborough, C. J.; *Annesley v. E. of Anglesea*, 17 How. St. Tr. 1276.

(e) *R. v. Houlton, Jebb*, C. C. 24.

§ 999. To this general rule excluding the husband and wife as witnesses, there are a *few exceptions*; some of which have been established by the Legislature. Thus, for instance, in the County Courts for the recovery of small debts and demands, the wives of the parties are enabled by statute to be examined as witnesses either for or against their husbands (*f*); and in bankruptcy proceedings, the Commissioners are empowered to summon the wife of the bankrupt, and to compel her to make discovery of her husband's estate (*g*).

§ 1000. Besides these statutable exceptions, there are some allowed *at common law*, from the *necessity* of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity, which demands this exception for the wife's security, is described to mean, "not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury" (*h*). Thus, a woman is clearly a competent witness against a man indicted for forcible abduction with intent to marry (*i*), if the force were continuing upon her till the marriage; of which fact she is also a competent witness; and, by the weight of the authorities, she is still competent, notwithstanding her subsequent assent to the marriage, and her voluntary cohabitation; for otherwise, the offender would take advantage of his own wrong (*k*). So, in Ireland, on

(*f*) 9 & 10 Vict. c. 95, § 83, cited ante, § 962.

(*g*) 6 Geo. 4, c. 16, § 37, which enacts, "that it shall be lawful for the commissioners [by writing under their hands, § 36] to summon before them the wife of any bankrupt, and to examine her [after she has made and signed a declaration to speak the truth, 8 & 9 Vict. c. 48, § 1. See post, § 1023] for the finding out and discovery of the estate goods and chattels of such bankrupt, concealed, kept or disposed of by such wife, in her own person, or by her own act, or by any other person; and she shall incur such danger or penalty for not coming before the commissioners, or for refusing to [make or sign her declaration] or to be examined, or for refusing to sign or subscribe her examination, or for not fully answering to the satisfaction of the commissioners, as is hereby provided against other persons."

(*h*) *Bentley v. Cooke*, 3 Doug. 424, per Lord Mansfield.

(*i*) Under 9 Geo. 4, c. 31, § 19.

(*k*) *R. v. Wakefield*, trial published by Murray; 2 Lew. C.C. 279, S.C.; 1 East's P. C. 454; *Brown's case*, 1 Ventr. 243; 1 Russ. C. & M. 709; 2 id. 984; *Perry's*

an indictment for the *fraudulent* abduction of an heiress under eighteen years of age (*l*), the lady was admitted as a witness for the prosecution (*m*). So, she may testify against her husband on an indictment for assisting at a rape committed on her person (*n*); or, for an assault and battery upon her (*o*); or, for maliciously shooting (*p*), or attempting to poison (*q*), her; or, it seems, for any other offence against her liberty or person (*r*). She may also exhibit articles of the peace against him; in which case her affidavit shall not be allowed to be controlled and overthrown by his own (*s*). Indeed Mr. East considers it to be settled, that, "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other" (*t*). But, though competent as a witness, it is not indispensable that such party should be called (*u*); and Mr. Justice Holroyd seems to have thought that the husband or wife could only be admitted to prove facts, which could not be proved by any other witness (*x*). It may be doubted, whether this be not restricting the rule within too narrow bounds.

§ 1001. In cases of *high treason*, the question, whether the wife is admissible as a witness against her husband, has been much discussed, and opinions of great weight have been given on both

case, cited in *R. v. Serjeant, Ry. & M.* 352; 1 *Hawk. P. C.*, c. 41, § 13; 1 *Bl. Com.* 443; *M'Nally's Ev.* 179, 180; 3 *Chitty's Cr. L.* 817, n. (*y*).

(*l*) Under 10 *Geo. 4*, c. 34, § 23. See 9 *Geo. 4*, c. 31, § 20.

(*m*) *R. v. Yore*, 1 *Jebb & Symes*, 563.

(*n*) Lord Audley's case, 3 *How. St. Tr.* 402, 413; *Hutton*, 115, 116; *B. N. P.* 287; *R. v. Jellyman*, 8 *C. & P.* 604.

(*o*) *B. N. P.* 287; *R. v. Azire*, 1 *Stra.* 633; *Soule's case*, 5 *Greenl.* 407.

(*p*) *R. v. Whitehouse*, cited 2 *Russ. C. & M.* 984.

(*q*) *R. v. Jagger*, cited 2 *Russ. C. & M.* 984.

(*r*) Per *Hullock, B.*, in *R. v. Wakefield*, trial by *Murray*, 257.

(*s*) *R. v. Doherty*, 13 *East*, 171; Lord Vane's case, *id. n. (a)*; 2 *Stra.* 1202; *R. v. E. Ferrers*, 1 *Burr.* 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation; *Lady Lawley's case*, *B. N. P.* 287; or, in a *habeas corpus* sued out by him, for the same object, *R. v. Mead*, 1 *Burr.* 542.

(*t*) 1 *East's P. C.* 465; *The People ex rel. Ordronaux v. Chegaray*, 18 *Wend.* 642.

(*u*) *R. v. Pearce*, 9 *C. & P.* 668.

(*x*) In *R. v. Whitehouse*, cited 2 *Russ. C. & M.* 984.

sides. The affirmative of the question is maintained (*y*), on the ground of the extreme necessity of the case, and the nature of the offence, tending, as it does, to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. But, on the other hand it is argued, that these political reasons are not sufficient to support an exception to a rule of general utility, and that, as the wife is not bound to discover her husband's treason (*z*), by parity of reason, she is not compellable to testify against him (*a*). The latter is perhaps the better opinion.

§ 1002. Upon the same principle on which the testimony of the husband or wife is sometimes admitted, as well as for some other reasons already stated (*b*), the *dying declarations* of either are admissible, where the other party is charged with the murder of the declarant (*c*).

§ 1003. THE FOURTH CLASS OF PERSONS INCOMPETENT TO TESTIFY includes witnesses, who, being called for the Crown in cases of *high treason* or misprision of treason, have not been included or properly described in a *list* duly delivered to the defendant. This head of incompetency rests on the Act passed in the seventh year of Queen Anne, which enacts (*d*), that, "when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, *mentioning the names, profession, and place of abode of the said witnesses* and jurors, be also given *at the same time that the copy of the indictment is delivered* to the party indicted; and that copies of all indictments for the offences aforesaid, *with such lists*, shall be delivered to the party indicted, *ten days before the trial*, and in presence of two or more credible

(*y*) B. N. P. 286; 1 Gilb. Ev. by Lofft, 252; Grigg's case, T. Raym. 1.

(*z*) 1 Brownl. 47.

(*a*) 1 Hale's P. C. 301; 2 Hawk. P. C. c. 46, § 82; Bac. Abr. tit. Ev. A. 1; 1 Chitty's Cr. L. 595; M'Nally Ev. 181.

(*b*) Ante, § 499, et seq.

(*c*) R. v. Woodcock, 1 Lea. C. C. 500; 1 East, P. C. 354, 356, S. C.; M'Nally Ev. 174; Stoop's case, Addis. 381.

(*d*) 7 Anne, c. 21, § 11.

witnesses." In explaining these words, it must be noted, first, that they do not extend to those treasons, which consist in compassing the assassination wounding or injuring the person of the Sovereign, or to the misprisions of such treasons; because parties accused of such grievous offences are, by statute, rendered liable to be dealt with, as if they stood charged with murder (e); and next, that although, in strict law, the list of witnesses should be delivered *simultaneously* with the jury list and the copy of the indictment, and that, too, ten days at least before the arraignment, (for the word "trial" must, since the Jury Act, bear this interpretation (f),) and in the presence of two or more credible witnesses;—yet any objection founded on the non-compliance with these regulations must be taken before the jury are sworn, and can only have the effect of postponing the trial (g). If, however, instead of raising any objection which goes to the array of witnesses, the defendant simply objects that some particular witness is incompetent, as not being included in the list, or as being misdescribed therein, this point, like any other question of competency, may be taken upon the voir dire when the witness is called, and if it prevails, he cannot be examined (h).

§ 1004. The Act, as we have seen, requires that the name, place of abode, and profession, of each witness should be stated in the list, the object of this regulation being, that the defendant should be enabled before the trial, to make all due inquiry respecting the characters of the persons who are about to testify against him. It is not, however, necessary that the list should specify the particular house or street where the witness resides, but it will suffice if it describes him as living in a certain town or parish (i). So, if the witness has two or more residences, the list need only specify one; but if it aim at further particularity, and any one of the places of abode be misdescribed, this inaccuracy will vitiate the

(e) 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, § 2, Ir.; 5 & 6 Vict. c. 51, § 1; ante, § 696.

(f) 6 Geo. 4, c. 59, § 21; R. v. Lord Geo. Gordon, 21 How. St. Tr. 648.

(g) R. v. Frost, 9 C. & P. 162—187; 2 Moo. C. C. 140, S. C.

(h) R. v. Frost, 9 C. & P. 183.

(i) R. v. Frost, 9 C. & P. 147, 148.

whole description (*k*). If the witness has recently changed his place of abode, the prisoner must be furnished with a description of his last residence, and it will not be sufficient to describe him as *lately* abiding at the former place (*l*).

§ 1005. In regard to the *proper time of taking the objection* to the competency of a witness on any of the foregoing grounds, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the witness is examined in chief. Indeed it has frequently been said by judges, and sometimes so held, that a party who is aware of the existence of any disqualification, cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony (*m*). However, this doctrine has recently been disputed by the Court of Exchequer (*n*), who have held, in conformity with some old decisions (*o*), that the objection may be raised *at any time during the trial*, and that too, whether the objector previously knew of the disqualification or not. The rule on this subject is the same in equity as at law (*p*), and in criminal as in civil cases (*q*); but perhaps in trials for high treason, the old doctrine of law would still be recognised, under which it has been held,

(*k*) *R. v. Frost*, 9 C. & P. 151—153.

(*l*) *R. v. Watson*, 2 Stark. R. 116, 128; 32 How. St. Tr. 69—73, S. C.

(*m*) *Dewdney v. Palmer*, 4 M. & W. 664; 7 Dowl. 177, S. C.; *R. v. Watson*, 2 Stark. R. 158; 32 How. St. Tr. 496, 497, S. C.; *R. v. Frost*, 9 C. & P. 183; *Beeching v. Gower*, Holt, N. P. R. 314, per Gibbs, C. J.; *Howell v. Lock*, 2 Camp. 14; *Donelson v. Taylor*, 8 Pick. 390, 392. In *Yardley v. Arnold*, 10 M. & W. 145, Parke, B., observed, "I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the voir dire; and that, when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto." See also *Hartshorne v. Watson*, 5 Bing. N. C. 477; 7 Scott, 494, S. C.; and *Wollaston v. Hakewill*, 3 M. & Gr. 297; 3 Scott, N. R. 593, S. C.; *Flagg v. Mann*, 2 Sumn. 487.

(*n*) *Jacobs v. Layborn*, 11 M. & W. 685.

(*o*) *Needham v. Smith*, 2 Vern. 463; *Lord Lovat's case*, 18 How. St. Tr. 596. See also *Stone v. Blackburn*, 1 Esp. 37; *Yardley v. Arnold*, C. & Marsh. 437, 438, per Parke, B.

(*p*) *Needham v. Smith*, 2 Vern. 463; *Vaughan v. Worrall*, 2 Madd. 322; 2 Swanst. 400, S. C.; *Selway v. Chappell*, 12 Sim. 113; *Swift v. Dean*, 6 Johns. 523, 538; *Gresley Ev.* 234—236.

(*q*) *Lord Lovat's case*, 18 How. St. Tr. 596; *Com. v. Green*, 17 Mass. 538.

that if the prisoner intends to object to a witness as being omitted from, or misdescribed in, the list furnished to him, he must do so before the witness is sworn in chief (*r*). In ordinary cases, too, it seems, that if the objection to the competency of a witness be not taken until *after the trial*, it will in general be considered as coming too late; and the Courts will not grant a new trial for this cause alone (*s*), unless the incompetency were known and concealed by the party producing the witness (*t*), or there be other evidence of *mala praxis* on his part (*u*).

§ 1006. With respect to the *mode* of taking the objection, the witness should, in strictness, be examined upon the *voir dire*; that is, he should be sworn to answer "all such questions as the Court shall demand of him," and be then questioned as to his competency (*v*). This oath, the peculiar form of which arises from the circumstance, that the points to which the witness is about to be examined are not evidence in the cause, may be administered at any stage of the trial; but for the sake of convenience it is now usually waived, and the witness is examined as to his competency after being sworn in chief (*x*). In courts of equity there is no examination on the *voir dire* (*y*).

§ 1007. Besides appealing to the oath of the witness, the party objecting to him as incompetent to testify in the cause, may prove his incompetency by evidence *aliunde*. But whether an election of one of these modes will preclude the party from afterwards resorting to the other, is not clearly settled by the authorities. If the evidence offered *aliunde* to prove the competency, is rejected as inadmissible, the witness may then be examined on the *voir dire* (*z*). And if the witness on the *voir dire* states that he does not know, or leaves it doubtful, whether he is incompetent or not, his

(*r*) *R. v. Watson*, 2 Stark. R. 158; 32 How. St. Tr. 496, 497, S. C.; *R. v. Frost*, 9 C. & P. 183.

(*s*) *Turner v. Pearte*, 1 T. R. 717; *Jackson v. Jackson*, 5 Cowen, 173. But see 11 M. & W. 691.

(*t*) *Niles v. Brackett*, 15 Mass. 378.

(*u*) *Wade v. Simeon*, 2 Com. B. 342.

(*v*) *Jacobs v. Layborn*, 11 M. & W. 689, per Rolfe, B.; 692, per Lord Abinger.

(*x*) *Id.* 693, per Lord Abinger.

(*y*) *Id.* 691, per *id.*

(*z*) *Main v. Newson*, Anthon's Cas. 13.

disqualification may be shown by other evidence (a). It has also been held, that a resort to one of these modes, to prove the incompetency of the witness on one ground, does not preclude a resort to the other mode, to prove the incompetency on another ground (b). And where the objection to the competency of the witness is founded upon the evidence already adduced by the party offering him, this has been adjudged not to be such an election of the mode of proof, as to preclude the objector from the right to examine the witness on the *voir dire* (c).

§ 1008. But subject to these modifications, the rule recognised and adopted by the general current of authorities is, that where the objecting party has undertaken to prove the incompetency of the witness, by interrogating him upon the *voir dire*, he shall not, upon failure of that mode, resort to the other to prove facts, the existence of which was known when the witness was interrogated (d). The party appealing to the conscience of the witness, offers him to the Court as a credible witness; and it is contrary to the spirit of the law of evidence, to permit him afterwards to say that the witness is not worthy to be believed. It would also violate another rule by its tendency to raise collateral issues. The question of competency is a collateral question; and the rule is, that where a witness is asked a question upon a collateral point, his answer is conclusive and cannot be contradicted; that is, no collateral evidence is admissible for that purpose (e). But if the evidence subsequently given upon the *matter in issue* should also prove the witness incompetent, his testimony may well be struck out without violating any rule.

§ 1009. Where the objection to the competency of the witness

(a) *Shannon v. Com.*, 8 Serg. & R. 444; *Galbraith v. Galbraith*, 6 Watts, 112; *Bk. of Columbia v. Magruder*, 6 Har. & J. 172.

(b) *Stebbins v. Sackett*, 5 Conn. 258.

(c) *Bridge v. Wellington*, 1 Mass. 221, 222.

(d) *Lord Lovat's case*, 18 How. St. Tr. 597, 730, per Lord Hardwicke; *R. v. Gisburn*, 15 East, 57.

(e) *Harris v. Tippet*, 2 Camp. 637; *R. v. Watson*, 2 Stark. R. 149—157; *Philadelphia and Trenton Co. v. Stimpson*, 14 Peters, 448, 461; *Harris v. Wilson*, 7 Wend. 57; *Odiorne v. Winkley*, 2 Gallis. 53.

arises either from other evidence in the cause, or from his own examination, it may be removed by further questioning the witness (*f*); and in the latter event, if not in both events, he may be interrogated to facts tending to remove the objection, though the testimony might on other grounds be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together, as he says it (*g*). Thus, where his incompetency appears, from his own testimony, to arise from a written instrument which is not produced, he may also testify to the contents of it; but if he produce the instrument, or it be in Court, it must speak for itself (*h*). So, where the witness for a chartered company stated that he had been a member, he was permitted also to testify that he had subsequently been disfranchised (*i*). So, where a witness, called by an administrator, stated that he was the next of kin, he was also allowed to prove by his own parol evidence, that he had released all his interest in the estate (*k*). And generally a witness, upon an examination as to his competency, may testify to the contents of any contracts, records, or documents not produced, affecting that question (*l*).

§ 1010. In proceeding to consider the law which renders the LAST CLASS OF PERSONS, viz., those who are *insensible to the obligations of an oath*, INCOMPETENT TO TESTIFY as witnesses, it is proper to observe, that one of the main securities provided by the law for the purity and truth of oral testimony, is, that it be delivered under the sanction either of an *oath*, or, in a few cases, of a solemn *affirmation* or *declaration*. Indeed, no person, whatever functions he may have to discharge in relation to the cause in question, or whatever be his rank, age, country, or belief, can give testimony

(*f*) *Brockbank v. Anderson*, 7 M. & Gr. 295, 313; 7 Scott, N. R. 813, S. C.

(*g*) *Abrahams v. Bunn*, 4 Burr. 2256, per Lord Mansfield.

(*h*) *Butler v. Carver*, 2 Stark. R. 433; *R. v. Gisburn*, 15 East, 57; *Lunniss v. Row*, 10 A. & E. 606; *Carlisle v. Eady*, 1 C. & P. 234; *Quarterman v. Cox*, 8 C. & P. 97.

(*i*) *Butchers' Co. v. Jones*, 1 Esp. 160; *Botham v. Swingler*, 1 Esp. 164; *Pea. R.* 218, S. C.

(*k*) *Ingram v. Dada*, 1 C. & P. 235, n.

(*l*) See cases cited in last three notes. These overrule *Goodhay v. Hendry*, M. & M. 319. See ante, § 342.

upon any trial, civil or criminal, until he have, in one form or other, given an outward pledge that he considers himself responsible to God for the truth of what he is about to narrate (*m*).

§ 1011. Thus, although each jurymen may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict (*n*). So a judge, before whom the cause is tried, must conceal any fact within his own knowledge, unless he be first sworn (*o*): and, consequently, if he be the sole judge, it seems that he cannot depose as a witness (*p*), though if he be sitting with others he may then be sworn and give evidence (*q*). In this last case, the proper course appears to be, that the judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial (*r*), because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another (*s*). It must, however, be noticed, that on several occasions, when trials have been instituted before the High Court of Parliament, peers, who have been examined as witnesses, have, nevertheless, taken part in the verdict

(*m*) In some few of the British colonies, where the aborigines are "destitute of the knowledge of God and of any religious belief," ordinances have been made for the admission of the testimony of such persons without the previous sanction of an oath, and the legality of such ordinances has recently been recognised and established by the legislature. See 6 & 7 Vict. c. 22.

(*n*) *R. v. Rosser*, 7 C. & P. 648, per Parke, B.; *Manley v. Shaw*, C. & Marsh. 361, per Tindal, C. J.; *Bennet v. Hartford*, Sty. 233; *Fitz-James v. Moys*, 1 Sid. 133; *Andr. R.* 321, arg.; *R. v. Heath*, 18 How. St. Tr. 123; *R. v. Sutton*, 4 M. & Sel. 532, 541, 542; 6 How. St. Tr. 1012, n.

(*o*) *R. v. Anderson*, 7 How. St. Tr. 874.

(*p*) *Ross v. Buhler*, 2 Martin's R. N. S. 312. But see 11 How. St. Tr. 459.

(*q*) *Trial of the Regicides*, Kel. 12; 5 How. St. Tr. 1181, n., S. C.

(*r*) *Id.* As to when judges are not compellable to testify, see ante, § 682.

(*s*) *Ross v. Buhler*, 2 Martin's R. N. S. 312. So is the law of Spain; *Partid.* 3, tit. 16, l. 19; 1 Moreau and Carleton's Tr. p. 200;—and of Scotland, *Glassford Ev.* 602; *Tait Ev.* 432; *Stair's Inst. lib.* 4, tit. 45, 4; *Erskine's Inst. lib.* 4, tit. 2, 33.

subsequently pronounced (*t*). But, perhaps, these cases are not inconsistent with the law as above stated, since in trials before the House of Lords, the peers must be regarded at least as much in the light of jurors as of judges; and we have before seen that a jurymen is not disqualified from acting, simply by being called as a witness.

§ 1012. Again, though a Peer is privileged, while sitting in judgment, to give his verdict upon his honour (*u*), and is also permitted to answer a bill in Chancery upon his protestation of honour, and not upon his oath (*x*), he cannot be examined as a witness in any cause, whether civil or criminal, or in any court of justice, whether it be an inferior court or the House of Lords, or in any manner, whether *vivâ voce*, or by interrogatories, or by affidavit, unless he be first sworn (*y*); for the respect which the law shows to the honour of a peer, does not extend so far as to overturn the settled maxim, that in *judicio non creditur nisi juratis* (*z*). If, therefore, he refuse to take the necessary oath or affirmation, he will, notwithstanding the privileges of peerage or of parliament, be guilty of a contempt for which he may be committed and fined (*a*).

§ 1013. It seems that even the Sovereign could not now claim any exemption from the rule requiring oral testimony to be given upon oath (*b*), though, on one occasion, the simple certificate of King James I., as to what had passed in his hearing, was received as evidence in the Court of Chancery (*c*). The question whether

(*t*) 7 How. St. Tr. 1384, 1458, 1552; 16 How. St. Tr. 1252, 1391.

(*u*) 2 Inst. 49.

(*x*) *Mears v. Lord Stourton*, 1 P. Wms. 146; 2 Salk. 512; S. C.; *Gresley Ev.* 65, n. (*f*), 2nd Ed.; Order of Parl. 31st Dec. 1640; *Beames' Ord.* in Ch. 105. If a foreign Sovereign sues in Chancery, and a cross bill is filed against him, he must put in his answer on oath; *King of Spain v. Hullett*, 1 Cl. & Fin. 333; 7 Bli. 359, S. C.; *Duke of Brunswick v. King of Hanover*, 6 Beav. 37.

(*y*) 2 How. St. Tr. 772, n.; 7 How. St. Tr. 1458; 16 How. St. Tr. 1252; *R. v. Preston*, 1 Salk. 278; *Lord Shaftesbury v. Lord Digby*, 3 Keb. 631.

(*z*) 2 Salk. 512; *Cro. Car.* 64; 1 Bl. Com. 402; 3 Bac. Abr. 202.

(*a*) 3 Salk. 278; 4 Lord Brougham's Speeches, 368.

(*b*) 2 Roll. Abr. 686; *Omichund v. Barker*, Willes, 550.

(*c*) *Abignye v. Clifton*, Hob. 213.

the Sovereign could be examined as a witness at all, seeing that the evidence would be without temporal sanction, may admit of some doubt. The point arose in the reign of Charles I., when the Earl of Bristol, who was impeached for high treason, proposed to call the King, for the purpose of proving certain conversations which he had held with him while Prince. The subject was referred to the judges; but they, acting under the direction of his Majesty, forebore from giving any opinion, and the question remains to this day undetermined (*d*). In the Berkeley Peerage Case there was some intention of calling the Prince Regent as a witness; but it ultimately became unnecessary to do so. On the whole, the better opinion seems to be, that the Sovereign, if so pleased, may be examined as a witness in any case, civil or criminal, but not without being sworn (*e*).

§ 1014. The wisdom of enforcing a strict observance of the rule, which requires witnesses to be sworn, cannot well be disputed; for, although the ordinary definition of an oath,—viz., “a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth” (*f*),—may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God;—not to call upon Him to punish the wrong doer, but on the witness to remember that He will assuredly do so;—still, it must be admitted, that by thus laying hold of the conscience of the witness, the law best insures the utterance of truth (*g*). But as the administration of an oath supposes that the witness feels a moral and religious accountability to a Supreme Being, who will justly punish perjury, and from whom no secrets are hid, it is obvious that persons, insensible to the obligations of an oath, ought not to be admitted as witnesses. The repetition of the words of an oath would, in their case, be but an unmeaning formality. It makes no difference from what cause this insensibility may have arisen; for whether it be occasioned by irreligious opinions, or by

(*d*) 2 Lord Campbell's *Lives of the Chancellors*, 510, 511.

(*e*) *Id.* in note.

(*f*) *R. v. White*, 1 Lea. C. C. 430; *Queen's case*, 2 B. & B. 285.

(*g*) *Tyler on Oaths*, 12—15. See also *Omichund v. Barker*, 1 Atk, 21; *Willes*, 538, S. C.

imbecility of understanding ; whether the person be an atheist, an idiot, a madman, a drunkard, or a child, so long as he is incapable of comprehending the nature, or feeling the obligation, of an oath, he cannot be sworn as a witness. The incapacity, however, is only coextensive with the defect. Thus, in the case of madness, the occurrence of a lucid interval (*h*) ;—in the case of intoxication, the return of sobriety (*i*) ;—and in the case of ignorance, the receiving of due religious instruction, will render the witness competent ; and the judges will occasionally postpone trials of importance, if there is ground for believing that the witness within a reasonable time can be rendered competent to testify, and if, without his testimony, the ends of justice will probably be defeated (*k*). But, if the witness is of so tender an age, that he obviously will not be capable of comprehending the meaning of an oath until after the lapse of a considerable period, a postponement of the trial will not be permitted ; because, in such a case, the loss in point of memory would more than countervail the gain in point of religious knowledge (*l*). In all cases, too, the application for postponement must be made before the jury are sworn, as the Court cannot on this ground discharge the jury after the commencement of the trial (*m*).

§ 1015. In regard to persons *deaf and dumb* from their birth, it has been said, that in presumption of law they are idiots. And though this presumption has not now the same degree of force which was formerly given to it, that unfortunate class of persons being found, by the light of modern science, to be much more intelligent in general, and susceptible of far higher culture, than was once supposed ; yet still the presumption is so far operative, as to devolve the burden of proof on the party adducing the witness, to show that he has a true notion of the moral and religious nature of an oath. This being done, a deaf mute may be sworn and give evidence, by means of an interpreter. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as

(*h*) Com. Dig. Testmoigne A. 1.

(*i*) *Hartford v. Palmer*, 16 Johns. 153 ; Heinec. ad Pandect. Pars. 3, § 14.

(*k*) *R. v. White*, 1 Lea. C. C. 430, n. (*a*) ; 3 Bac. Ab. 202, n.

(*l*) *R. v. Nicholas*, 2 Car. & Kir. 246, per Pollock, C. B.

(*m*) *R. v. Wade*, 1 Moo. C. C. 86 ; *R. v. Kinlock*, 18 How. St. Tr. 402, 408.

the more satisfactory method (*n*); but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs (*o*).

§ 1016. With respect to *children*, there is no *precise age* within which they are absolutely excluded, on the presumption that they have not sufficient understanding. At the age of fourteen, every person is presumed to have common discretion and understanding, till the contrary appears; but under that age it is not so presumed; and therefore inquiry is made as to the degree of understanding which the child, offered as a witness, may possess; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be (*p*). In practice, it is not unusual to receive the testimony of children of *eight* or *nine years of age*, if they appear to possess sufficient understanding; and in *Brasier's case*, which was an indictment for assaulting with intent to rape an infant, who was certainly under seven years of age (*q*), and perhaps only five (*r*), all the judges held that she might have been examined upon oath, if, on strict examination by the Court, she had been found to comprehend the danger and impiety of falsehood. But, in *Pike's case* (*s*), Mr. Justice Park, with the concurrence of Mr. Justice James Parke, promptly rejected the dying declarations of a child of four years of age, observing that, however precocious her mind might have been, it was quite impossible that she could have had that idea of a future state, which is necessary to make such declarations admissible.

§ 1017. No precise rule can be laid down respecting the

(*n*) *Morrison v. Lennard*, 3 C. & P. 127.

(*o*) *Id.*; *The State v. De Wolf*, 8 Conn. 93; *Com. v. Hill*, 14 Mass. 207.

(*p*) *R. v. Brasier*, 1 Lea. C. C. 199; 1 East, P. C. 443; B. N. P. 293, S. C.; *Jackson v. Gridley*, 18 Johns. 98.

(*q*) 1 Lea. C. C. 199. See also *R. v. Perkin*, 2 Moo. C. C. 139, where Alderson, B., observed—"It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge will allow him to be sworn."

(*r*) 1 East, P. C. 443.

(*s*) 3 C. & P. 598.

degree of intelligence and knowledge which will render a child a competent witness; and, in these cases, much must ever depend upon the good sense and discretion of the judge; but it may here be observed, that where a girl, eight years old, had, subsequently to the events which she was called to prove, been twice visited by a clergyman, who had given her some instructions as to the nature of an oath, but it appeared that before such visits, she had had no religious education whatever, and had never heard of a future state, and even at the trial had no real understanding on the subject, Mr. Justice Patteson rejected her evidence, observing, that "he must be satisfied that the child felt the binding obligation of an oath from the *general* course of her religious education; and, that the effect of the oath upon the conscience should arise from religious feelings of a *permanent* nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of the trial" (t). Perhaps the language, which the learned judge is here reported to have used, was somewhat stronger than the law warranted, and it certainly went further than the facts of the case required, as the child, even when offered as a witness, had no real knowledge of the nature of an oath. Had not this proved to have been the case, it seems difficult to see upon what valid ground her testimony could have been rejected; for whether she was instructed in religious knowledge previously or subsequently to the commission of the crime in question, or whether the instruction was intended to excite permanent feelings, or merely to secure the temporary purpose of enabling her to swear to the facts she had witnessed, can signify nothing, provided that, at the time when she was called upon to give her evidence, she was really aware of the solemn responsibility which devolved upon her of speaking the truth. Accordingly, in Ireland, it has been held that, even on an indictment for murder, an infant might be examined, though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness (u). It seems almost needless to add, that a child, like a grown person, cannot, under any circumstances, be

(t) R. v. Williams, 7 C. & P. 320.

(u) R. v. Milton, Ir. Cir. Rep. 61, per Doherty, C. J.

examined in court without the sanction of an oath (*x*). Neither can hearsay evidence be given of the declarations of a child, who hath not capacity to be sworn (*y*).

§ 1018. Persons insensible to the obligations of an oath from *defect of religious sentiment and belief* are also incompetent to testify as witnesses, because the very nature of an oath, as above explained (*x*), presupposes a belief in the existence of an omniscient Supreme Being, who is "the rewarder of truth and avenger of falsehood" (*a*). Without this belief, the person cannot be subject to that sanction, which the law deems an indispensable test of truth. It is not sufficient that a witness feels himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with that of most civilized countries, requires the additional security afforded by the religious sanction implied in an oath; and, as a necessary consequence, rejects all witnesses who are incapable of giving this security (*b*). Atheists, therefore, and all persons professing no religion, that can bind their consciences to speak truth, are rejected as incompetent to testify as witnesses (*c*).

§ 1019. The rule of law, which fixes the *nature and degree of religious faith* required in a witness, seems, as at present understood, to be this;—that the person is competent to testify, if he believes in the existence of God, and that Divine punishment will be the certain consequence of perjury. It may be considered as now generally settled in this country, as well as in America, that it is not material whether the witness believes that the punishment will be inflicted in this world, or in the next. It is enough if he has the religious

(*x*) *R. v. Brasier*, 1 Lea. C. C. 199, overruling the opinion of Lord Hale. See 1 Hale, P. C. 634.

(*y*) *Id.*; *R. v. Nicholas*, 2 Car. & Kir. 246; *R. v. Pike*, 3 C. & P. 598; 4 Bl. Com. 214; ante § 502.

(*z*) Ante, § 1014. (*a*) Per Lord Hardwicke, 1 Atk. 48.

(*b*) 1 Ph. Ev. 7. (*c*) B. N. P. 292; 1 Atk. 40, 45; 1 Ph. Ev. 10.

sense of accountability to the Omniscient Being, who is invoked by an oath (d).

§ 1020. It should here be observed, that defect of religious faith is *never presumed*. On the contrary the law presumes, that every man brought up in a Christian land, where God is generally acknowledged, does believe in him and fear him. The charity of its judgment is extended alike to all. The burden of proof is not on the party adducing the witness, to prove that he is a believer; but it is on the objecting party, to prove that he is not. Neither does the law presume, that any man is a hypocrite. On the contrary, it presumes him to be what he professes himself to be, whether atheist or Christian; and the state of a man's opinions, as well as the sanity of his mind, being once proved, is, as we have already seen (e), presumed to continue unchanged till the contrary is shown. The state of his religious belief, at the time he is offered as a witness, is the fact to be ascertained; and this is presumed to be the common faith of the country, unless the objector can prove that it is not. The ordinary mode of showing this is by evidence of his declarations, previously made to others; the *person himself not being interrogated*; for the object of interrogating a witness, in any case, before he is sworn, is not to obtain the knowledge of other

(d) The proper test of the competency of a witness on the score of religious belief was settled, upon great consideration, in the case of *Omichund v. Barker*, Willes 545; 1 Atk. 21, S. C., to be, the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognised in *Butts v. Swartwood*, 2 Cowen, 431; *The People v. Matteson*, 2 Cowen, 433, 573, n.; and by Story, J., in *Wakefield v. Ross*, 5 Mason, 18; 9 Dane's Abr. 317, S. P. Whether any belief in a future state of existence is necessary, provided accountability to God in this life is acknowledged, is not perfectly clear. In *Com. v. Bachelor*, 4 Am. Jurist, 81, Thacher, J., seemed to think it was. But in *Hunscom v. Hunscom*, 15 Mass. 184, the Court held that mere disbelief in a future existence went only to the credibility. This degree of disbelief is not inconsistent with the faith required in *Omichund v. Barker*. The only case clearly to the contrary, is *Attwood v. Welton*, 7 Conn. 66. In *Curtis v. Strong*, 4 Day, 51, the witness did not believe in the obligation of an oath; and in *Jackson v. Gridley*, 18 Johns. 98, he was a mere atheist, without any sense of religion whatever. All that was said, in these two cases, beyond the point in judgment, was extrajudicial. In Maine, a belief in the existence of the Supreme Being is rendered sufficient by stat. 1833, c. 58, without any reference to rewards or punishments. *Smith v. Coffin*, 6 Shepl. 157.

(e) Ante, § 123; *The State v. Stinson*, 7 Law Reporter, 383.

facts, but to ascertain from his answers the extent of his capacity, and whether he has sufficient understanding to be sworn (f).

(f) "The witness himself is never questioned, in *modern* practice, as to his religious belief; though formerly it was otherwise. (1 Swift's Dig. 739; 5 Mason, 19; 4 Am. Jurist, 79, n.) It is not allowed, even after he has been sworn. (The Queen's case, 2 B. & B. 284.) Not because it is a question tending to disgrace him; but because it would be a personal scrutiny into the state of his faith, and conscience, foreign to the spirit of our institutions. No man is obliged to avow his belief; but if he voluntarily does avow it, there is no reason why the avowal should not be proved, like any other fact. The truth and sincerity of the avowal, and the continuance of the belief thus avowed, are presumed, and very justly too, till they are disproved. If his opinions have been subsequently changed, this change will generally, if not always, be proveable in the same mode. (Attwood v. Welton, 7 Conn. 66, Curtis v. Strong, 4 Day, 51; Swift's Evid. 48—50; Mr. Christian's note to 3 Bl. Com. 369; Com. v. Bachelier, 4 Am. Jurist, 79, n.) If the change of opinion is very recent, this furnishes no good ground to admit the witness himself to declare it; because of the greater inconvenience, which would result from thus opening a door to fraud, than from adhering to the rule requiring other evidence of this fact. The old cases, in which the witness himself was questioned as to his belief, have on this point been *overruled*. See Christian's note to 3 Bl. Com. 369, n. (30). The law, therefore, is not reduced to any absurdity in this matter. It exercises no inquisitorial power; neither does it resort to secondary or hearsay evidence. If the witness is objected to, it asks third persons to testify, whether he has declared his disbelief in God and in a future state of rewards and punishments, &c. Of this fact they are as good witnesses as he could be; and the testimony is primary and direct. It should further be noticed, that the question, whether a person about to be sworn is an atheist or not, can never be raised by any one but an adverse party. *No stranger or volunteer has a right to object*. There must, in every instance, be a suit between two or more parties, one of whom offers the person in question as a competent witness. The presumption of law, that every citizen is a believer in the common religion of the country, holds good till it is disproved; and it would be contrary to all rule to allow any one, not party to the suit, to thrust in his objections to the course pursued by the litigants. This rule and uniform course of proceeding shows how much of the morbid sympathy, expressed for the atheist, is wasted. For there is nothing to prevent him from taking any oath of office; nor from swearing to a complaint before a magistrate; nor from making oath to his answer in Chancery. In this last case, indeed, he could not be objected to, for another reason, namely, that the plaintiff in his bill requests the Court to require him to answer upon his oath. In all these, and many other similar cases, there is no person authorised to raise an objection. Neither is the question permitted to be raised against the atheist, where he is himself the adverse party, and offers his own oath in the ordinary course of proceeding. If he would make affidavit in his own cause to the absence of a witness, or to hold to bail, or to the truth of a plea in abatement, or to the loss of a paper, or to the genuineness of his books of account, or to his fears of bodily harm from one against whom he requests surety of the peace, or

§ 1021. It may be added, in this place, that all witnesses are to be sworn according to the peculiar ceremonies of their own religion; or, *in such manner* as they may *deem binding* on their own consciences (*g*). It would seem that this was the rule at common law,

would take the poor debtor's oath; in these and the like cases, the uniform course is to receive his oath, like any other person's. The law, in such cases, does not know that he is an atheist; that is, it never allows the objection of infidelity to be made against any man, seeking his own rights in a court of justice; and it conclusively and absolutely presumes that, so far as religious belief is concerned, all persons are capable of an oath, of whom it requires one as the condition of its protection or its aid; probably deeming it a less evil, that the solemnity of an oath should, in a few instances, be mocked by those who felt not its force and meaning, than that a citizen should, in any case, be deprived of the benefit and protection of the law, on the ground of his religious belief. The state of his faith is not inquired into, where his own rights are concerned. He is only prevented from being made the instrument of taking away those of others." 1 Law Reporter, pp. 347, 348.

(*g*) "Quumque sit adseveratio religiosa, satis patet, jusjurandum attemperandum esse cujusque religioni." Heinec. ad Pand. p. 3, § 13, 15. "Quodcumque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjurii sui idoneum esse vindicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex sua ipsius animi religione," &c. Bynk. Obs. Jur. Rom. lib. 6, c. 2. See also Puff. lib. 4, c. 2, § 4. The formula of taking an oath, which was anciently adopted by the Romans, was as follows:—The witness held a flint stone in his right hand, and dropped it as he uttered these words—*Si sciens fallo, tum me Diespiter, salvâ urbe arceque, bonis ejiciat, ut ego hanc lapidem*. Adam's Ant. 247. Cic. Fam. Ep. vii. 1, 12. Under the Christian emperors it was taken, invocato Dei Omnipotentis nomine, Cod. lib. 2, tit. 4, l. 41. *Sacrosanctis evangeliis tactis*, Cod. lib. 3, tit. 1, l. 14. And Constantine adds, in a rescript, *Jurisjurandi religione testes, priusquam perhibeant testimonium, jamdudum arctari præcipimus*. Cod. lib. 4, tit. 20, l. 9. In Morgan's case, 1 Lea. C. C. 54, a Mahomedan was sworn thus—First, he placed his right-hand flat upon the Koran, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head: he then looked for some time upon it, and, on being asked what that ceremony was to produce, he answered that he was bound by it to speak the truth. In Scotland, members of the Kirk are sworn by the form of holding up the right hand, without touching the book or kissing it. Mildrone's case, 1 Lea. C. C. 412; Walker's case, id. 498; Mee v. Reid, 1 Pea. R. 23. It seems that in this case the form of words may either be, "I, A. B., swear by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give," &c.; or, "I swear, according to the custom of my country and the religion I profess, that the evidence," &c. See 1 Lea. C. C. 412. A Jew is sworn on the Pentateuch with his head covered, Willes 543; but if he professes Christianity, he may be sworn on the New Testament, though he has not formally renounced Judaism, R. v. Gilham, 1 Esp. 285. A Chinese is sworn by the ceremony of his breaking a saucer previously to the administration of the oath, R. v. Entrehman, C. & Marsh. 248. Roman Catholics in Ireland are sworn on a Testament, with a crucifix or cross upon it. M'Nally's Ev. 97.

but all doubt on the subject is now removed by the Act of 1 & 2 Vict. c. 105, which enacts, that all persons shall be bound by the oaths which are lawfully administered to them, provided they are administered in such form, and with such ceremonies, as the parties sworn declare to be binding on their consciences. In order to ascertain what form is so binding, the Court should inquire of the witness himself; and the proper time for making this inquiry is before he is sworn. If, however, the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked, whether he thinks it binding on his conscience; but if he answers in the affirmative, he cannot then be further asked, if he considers any other form of oath more binding (*g*). Neither can a witness, who states that he is a Christian, be asked any further questions before he is sworn (*h*). If a witness, without objecting, is sworn in the usual mode, but, being of a different faith, the oath was not in a form affecting his conscience,—as if, being a Jew, he was sworn on the Gospels,—he is still punishable for perjury if he swears falsely, and the adverse party cannot for this cause have a new trial (*i*).

§ 1022. In some few instances, the Legislature, out of tender regard for the *conscientious scruples* of certain religious sects, has allowed them, in the place of taking an oath, to make a *solemn affirmation*; but such affirmation has the same effect as an oath, and persons who knowingly affirm what is false are equally guilty of perjury with those who falsely swear. Thus, the Act of 3 & 4 Will. 4, c. 49, allows Quakers and Moravians to affirm in all cases where an oath is required (*k*); the Act of 3 & 4 Will. 4, c. 82,

(*g*) The Queen's case, 2 B. & B. 284.

(*h*) R. v. Serva, 2 C. & Kir. 56, per Platt, B.

(*i*) Sells v. Hoare, 3 B. & B. 232; 7 Moore, 36, S. C. The State v. Whisenhurst, 2 Hawks, 458. See R. v. Wood, 1 Jebb & Bourke, Q. B. Ir. R. vii. Whether a party may obtain a new trial, if a witness on the other side has testified without having been sworn at all, *quære*. If the omission of the oath was known at the time, it seems he cannot. Lawrence v. Houghton, 5 Johns. 129; White v. Hawn, ib. 351. But if it was not discovered till after the trial, he may. Hawks v. Baker, 6 Greenl. 72.

(*k*) The form is as follows.—“I, A. B., being one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, as the case may be,] do solemnly, sincerely, and truly declare and affirm, &c.”

contains a similar provision in favour of the sect of Separatists (*l*); and the Act of 1 & 2 Vict., c. 77, which was passed in consequence of the decision pronounced by the judges in Doran's case (*m*), extends the privilege to all persons who have been Quakers or Moravians, but have ceased to belong to either of those sects (*n*).

§ 1023. On the ground too, "that oaths should not be administered unnecessarily by public authority," it has lately been determined by Parliament, that *bankrupts* and their *wives* shall be examined before the commissioners in bankruptcy without being sworn, but after making and signing a declaration to speak the truth (*o*); the Act further providing that the offence of wilfully making a false statement shall render the party liable to the penalties of perjury (*p*).

(*l*) This is the form—"I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of that religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also, in the same solemn manner, declare and affirm, &c."

(*) 2 Moo. C. C. 37.

(*) The form is this—"I, A. B., having been one of the people called Quakers, [or one of the persuasion of the people called Quakers, or of the United Brethren called Moravians, *as the case may be*,] and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm, &c."

(*o*) 8 & 9 Vict. c. 48, § 1. The form of declaration is as follows—"I, A. B., the person declared a bankrupt under a fiat in bankruptcy, [or, I, C. D., the wife of, &c.,] do solemnly promise and declare, that I will make true answer to all such questions as may be proposed to me respecting all the property of the said A. B., and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property, to the best of my knowledge, information, and belief.

"(Signed)

"A. B.,

"or C. D., the wife of the said A. B."

(*p*) Id. § 2.

CHAPTER III.

OF THE EXAMINATION OF WITNESSES.

§ 1024. HAVING thus treated of the means of procuring the attendance of witnesses, and of their competency and credibility, we come now to consider the manner in which they are to be *examined*. And here it should first be observed, that this subject lies chiefly in the discretion of the judge before whom the cause is tried (*a*), being, from its very nature, susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness; but the character, intelligence, courage, interest, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation, and the degree of its intensity, to attain that end. This manner and degree, therefore, as well as the other circumstances of the trial, must necessarily be left somewhat at large, subject to the few general rules, which we now proceed to state.

§ 1025. If the judge deems it essential to the discovery of truth, that the witnesses should be *examined out of the hearing of each other*, he will order them all on both sides to withdraw, excepting the one under examination; and this order, upon the motion of either party at any period of the trial (*b*), is rarely withheld, though it is not demandable of strict right (*c*). But if it be intended to call as a witness an attorney in the cause, he will usually be excepted from the order to withdraw, upon a statement being made by counsel, that his personal attendance in court is

(*a*) *Bastin v. Carew*, Ry. & Moo. 127, per Abbott, C. J.

(*b*) *Southey v. Nash*, 7 C. & P. 632.

(*c*) In *Southey v. Nash*, 7 C. & P. 632, Alderson, B., is reported to have held, that either party had a right to require that the unexamined witnesses should be out of court; but this ruling, if it be law, which we much doubt, applies only to civil cases, since the contrary has repeatedly been held in criminal trials. See *R. v. Cook*, 13 How. St. Tr. 348, per Treby, C. J.; *R. v. Vaughan*, id. 494, per

necessary (c). A similar exception will also be allowed in favour of those medical or other professional witnesses, who are summoned to give scientific opinions upon the circumstances of the case, as established by other testimony; and who, consequently, will be permitted to remain in court, until this particular class of evidence commences, when, like ordinary witnesses, they will have to withdraw, and to come in one by one so as to undergo a separate examination (d).

§ 1026. If a witness remains in court in contravention of an order to withdraw, he renders himself liable to fine and imprisonment for the *contempt* (e); and, until lately, it was considered that the judge, in the exercise of his discretion, might even exclude his testimony (f). But it seems to be now settled, that the judge has *no right to reject the witness* on this ground, however much his wilful disobedience of the order may lessen the value of his evidence (g). In *revenue cases*, indeed, as tried in the Exchequer, a stricter rule is said to prevail; and in order to prevent any imputation of unfairness, in these delicate proceedings between the Crown and the subject, the testimony of any witness who has remained in court, whether contumaciously or not, after an order to withdraw, has hitherto been inflexibly rejected (h). Whether

Lord Holt; *R. v. Goodere*, 17 id. 1015, per Sir Michael Foster. In *R. v. Murphy*, 8 C. & P. 307, Coleridge, J., observed, that it was almost a matter of right for the opposite party to have a witness out of court, while any legal argument was going on respecting his evidence.

(c) *Everett v. Lowdham*, 5 C. & P. 91, per Bosanquet, J.; *Pomeroy v. Baddeley*, Ry. & M. 430, per Littledale, J. But a special application must be made to except him. *R. v. Webb*, Ry. & M. 431, n.

(d) See *Alison Prac. Cr. L. of Sc.* 489, 542—545; *Tait Ev.* 420.

(e) *Chandler v. Horne*, 2 M. & Rob. 423.

(f) *Parker v. M'William*, 6 Bing. 683; 4 M. & P. 480, S. C.; *Thomas v. David*, 7 C. & P. 350; *R. v. Colley*, M. & M. 329; *Beamon v. Ellice*, 4 C. & P. 585; *R. v. Wyld*, 6 C. & P. 380; *R. v. Lavin*, Ir. Cir. R. 813, per Perrin, J., and Richards, B.

(g) *Chandler v. Horne*, 2 M. & Rob. 423, per Erskine, J., who stated that it was now so settled by all the judges. See also *Cook v. Nethercote*, 6 C. & P. 743, per Alderson, B.; *Doe v. Cox*, id. in note; 1 *Clifford's Southwark Election Cas.* 114, S. C.

(h) *Att.-Gen. v. Bulpit*, 9 Price, 4; *Parker v. M'William*, 6 Bing. 683; *Thomas v. David*, 7 C. & P. 351, per Coleridge, J. *Not given in Sullivan's Ann Mac & Co. 294 which held by Brady C.B. that it is not an inflexible rule in Ireland to reject a witness who in a revenue cause had remained in Court, after an order for witnesses to withdraw*

this rule is calculated to effect its object, is a doubtful question, and perhaps, at the present day, it would not be rigidly enforced.

§ 1027. The practice of ordering witnesses out of court may be traced to a remote antiquity, it being noticed with approbation by Fortescue in his work *de Laudibus Legum Angliæ* (i); and no man who has reflected upon the nature of evidence, or even read the quaint story of Susanna, narrated in the Apocrypha (k), but must acknowledge the utility of such a course, as an admirable means of detecting conspiracy and falsehood. In order, however, to render the practice duly efficient, it is not enough to order the witnesses simply to withdraw out of hearing, but means should be afforded for keeping them in some separate room, until they are called for; so that they might lose the opportunity, not only of listening to the examination of those who preceded them, but, what is of equal importance, of conversing with them afterwards. We may add that, in Scotland (l), all the witnesses on either side are usually shut up in an apartment by themselves, whence they are successively and separately called into court to be examined (m);

(i) His words are, "*Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum.*" C. 26. See also *Williams v. Hulie*, 1 Sid. 131; *Swift Ev.* 512.

(k) Where Daniel detected the perjury of the two old judges, who, as eye-witnesses, had accused the wife of Joacim of adultery; but who, on being examined apart, differed as to the place where the crime was committed, the one swearing it was under a mastick tree, the other under a holm tree.

(l) It was formerly the law of Scotland, that if a witness was objected to as having remained in court without permission, his evidence could not be heard, but the act of 3 & 4 Vict. c. 59, § 3, enacts, "that in any trial before any judge of the court of session or court of justiciary, or before any sheriff or steward of Scotland, it shall not be imperative on the Court to reject any witness against whom it is objected that he or she has, without the permission of the Court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the Court, in its discretion, to admit the witness, where it shall appear to the Court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

(m) *Alison's Pract.* 542—545; *Tait Ev.* 420; 2 *Hume Com.* 189; 19 *How. St. Tr.* 331, n.

and the system of separate examination also prevails theoretically, if not practically, in both Houses of Parliament (n).

§ 1028. When the competency of a witness, if objected to, is settled, he is first duly sworn in the cause by the officer of the Court, and is then examined by the party producing him (o). This is called his *direct examination*, or his *examination in chief*; and in this examination, *leading questions*, that is, questions which suggest to the witness the answer desired (p), or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative (q), are not, in general, allowed to be put (r). Still, this rule must be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to that part of the examination (s), which is merely introductory of that which is material. With respect even to material points, the judge, in his discretion, will sometimes allow leading questions to be put in a direct examination; as, for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested

(n) *Taylor v. Lawson*, 3 C. & P. 543, per Best, C. J.

(o) Formerly in the Scotch courts as soon as a witness was sworn, it was necessary for the judge to examine him *in initialibus*, that is, to ask him whether he had been instructed what to say, or had received or had been promised any good deed for what he was to say, or whether he bore any ill will to the adverse party, or had any interest in the cause, or concern in conducting it; together with his age, and whether he was married or not, and the degree of his relationship to the party adducing him, *Tait Ev.* 424; but now this course is no longer necessary, though it is still competent for the judge, or for the party against whom the witness shall be called, to examine him *in initialibus*, as heretofore, 3 & 4 Vict. c. 59, § 2.

(p) 1 St. Ev. 169; 2 Ph. Ev. 401; *Alison Pract.* 545; *Tait Ev.* 427; 24 How. St. Tr. 659, 660, n.

(q) *Nicholls v. Dowding*, 1 Stark. R. 81, per Lord Ellenborough.

(r) For an early instance, see *R. v. Rosewell*, 10 How. St. Tr. 190.

(s) *Nicholls v. Dowding*, 1 Stark. R. 81, per Lord Ellenborough.

for the other party, or unwilling to give evidence (*t*). Indeed, if the witness stands in a situation, which of necessity makes him adverse to the party calling him, as, for example, if in an issue out of Chancery, he is a defendant whom the plaintiff is empowered to examine, leading questions may, it seems, be asked him as a matter of right (*u*). So, on the trial of an issue *devisavit vel non*, directed by the Court of Chancery, if the plaintiff, in obedience to the rule of that court, calls the second attesting witness, whose evidence tends to prove the insanity of the testator, he will be allowed to put questions to him in the nature of a cross-examination; because in cases of this kind, as the witness is rather the witness of the Court than of the party, considerable latitude in the mode of conducting the examination should, in common fairness, be permitted (*x*).

§ 1029. Again, a witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by *want of recollection*, which a *suggestion* may assist. Thus, when a witness stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but thought that he might possibly recognise them if suggested, this was permitted to be done (*y*). So, for the purpose of identification, the witness may be directed to look at a particular person, and say whether he is the man (*z*). So, where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it; as, where he is called to contradict another respecting the contents of a lost letter, and cannot, offhand, recollect all its contents, the particular passage may be suggested to him, at least, after his unaided memory has been exhausted (*a*). So, where a witness is called to contradict

(*t*) *R. v. Chapman*, 8 C. & P. 559, per Lord Abinger; *R. v. Ball*, id. 745; *R. v. Murphy*, id. 306—308, per Coleridge, J.; *Clarke v. Saffery*, Ry. & M. 126, per Best, C. J.; *Parkin v. Moon*, 7 C. & P. 409, per Alderson, B.

(*u*) *Clarke v. Saffery*, Ry. & M. 126.

(*x*) *Bowman v. Bowman*, 2 M. & Rob. 501, per Cresswell, J.

(*y*) *Acerro v. Petroni*, 1 Stark. R. 100, per Lord Ellenborough.

(*z*) *R. v. Watson*, 32 How. St. Tr. 74, per Lord Ellenborough; 2 Stark. R. 128, S. C.; *R. v. Berenger*, 2 Stark. R. 129, n. per id.

(*a*) *Courteen v. Touse*, 1 Camp. 43, per Lord Ellenborough.

another, who has denied having used certain expressions, counsel are sometimes permitted to ask, whether the particular words denied were not in fact uttered by the former witness (*b*); but this rule, it seems, only applies to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible (*c*). Again, the judge will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation (*d*); and indeed, it must always be remembered, that the Court has a discretionary power of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, it may think fit, though the power should only be exercised so far as the purposes of justice plainly require (*e*).

§ 1030. Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is sometimes permitted to *refresh* and assist his *memory*, *by the use of a written instrument*, memorandum, or entry in a book. But this course, excepting in the case of scientific witnesses referring to professional books as the foundation of their opinions (*f*), can only be adopted, where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable, that the memory of the witness had not then become defective (*g*). In one Scotch case, the majority of the Court would not allow a witness to consult notes, which he had prepared *some weeks* after the transactions had occurred, and when he had reason to believe that he should be called to give evidence (*h*). And, in another case, the witness was not permitted to refresh his memory with a copy of a paper taken by himself *six months* after he made the original, though the

(*b*) *Edmonds v. Walter*, 3 Stark. R. 8, per Abbott, C. J.

(*c*) *Hallett v. Cousins*, 2 M. & Rob. 238, per Erskine, J.

(*d*) *Moody v. Rowell*, 17 Pick. 498.

(*e*) *Id.*

(*f*) As to this practice, see post, §§ 1041, 1042.

(*g*) *R. v. Horne Tooke*, cited 25 How. St. Tr. 936; *Burrough v. Martin*, 2 Camp. 112; *Smith v. Morgan*, 2 M. & Rob. 257; *Wood v. Cooper*, 1 C. & Kir. 645.

(*h*) *R. v. Sir A. Gordon Kinloch*, 25 How. St. Tr. 934—937.

original was proved to have become illegible ; the learned judge saying, that the witness could only look at the original memorandum, made *near* the time (*i*). In all cases of this kind, the practice must be governed by the peculiar circumstances ; but, perhaps, if the witness will swear positively, that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them, though they were drawn up a considerable time after the transactions had occurred (*k*). If, however, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his attorney, they can in no case be permitted to be used, for if they were, a door might be opened to the grossest fraud. Therefore, where a witness had drawn up a paper for the party calling him, after the cause was set down for trial, though eighteen months before the trial was actually heard, the Court would not allow him to refer to it (*l*). And where a witness had herself noted down the transactions as they occurred, but had requested the solicitor for the party she supported to digest her notes into the form of minutes, which she had afterwards revised and transcribed, the Lord Chancellor indignantly suppressed her deposition, she having had recourse to these minutes for the purpose of refreshing her memory (*m*).

§ 1031. Whether the witness can refresh his memory by referring to a mere *copy* of his original memorandum is a question of some difficulty and doubt. In several cases he has been allowed to do so, where, having looked at the copy, he was enabled to swear positively to the facts from *his own recollection* (*n*) ; but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness,

(*i*) *Jones v. Stroud*, 2 C. & P. 196, per Best, C. J.

(*k*) *R. v. Sir A. Gordon Kinloch*, 25 How. St. Tr. 937 ; *Wood v. Cooper*, 1 C. & Kir. 646, per Pollock, C. B.

(*l*) *Steinkeller v. Newton*, 9 C. & P. 315, per Tindal, C. J.

(*m*) *Anon.*, cited by Lord Kenyon in *Doe v. Perkins*, 3 T. R. 752—754. See *Sayer v. Wagstaff*, 5 Beav. 462.

(*n*) *Tanner v. Taylor*, cited per Buller, J., in *Doe v. Perkins*, 3 T. R. 754, as decided by Legge, B. ; *Anon.*, per Bayley, J., 1 Lew. C. C. 101 ; *Duchess of Kingston's case*, 20 How. St. Tr. 619 ; *R. v. Hedges*, 28 How. St. Tr. 1367.

either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy. Even then, it may be questionable whether the copy should be used, so long as the original is in existence, and its absence unexplained: for there is much weight in the remark of Mr. Justice Patteson, who observes, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself, or be merely used to refresh the memory (*o*). Be this as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness have no *independent* recollection of the facts narrated therein, the original must be used (*p*). The case of *Barton v. Plummer* (*q*) in no way contravenes this rule. There, the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger. The transactions in trade had been noted by the clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the time checked by the clerk. Under these circumstances, the Court very properly regarded the ledger as an original, and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in *Horne v. Mackenzie* (*r*), where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid.

§ 1032. Before a witness can refresh his memory by looking at

(*o*) *Burton v. Plummer*, 2 A. & E. 344. See also *Jones v. Stroud*, 2 C. & P. 196.

(*p*) *Doe v. Perkins*, 3 T. R. 749; explained by Patteson, J., in 2 A. & E. 215; *R. v. Hedges*, 28 How. St. Tr. 1367, per Lord Ellenborough; *Solomons v. Campbell*, cited 1 St. Ev. 177, 178, n., per Abbott, C. J. (*q*) 2 A. & E. 341.

(*r*) 6 Cl. & Fin. 628, 630, 645. See also *Topham v. Macgregor*, 1 C. & Kir. 320, where the writer of an article in a newspaper was allowed to refresh his memory by the paper, his MS. being proved to be lost.

memoranda, it seems to be further necessary that they should have been made, either *by the witness* himself, or *by some person in his presence* (s), or, at least, that he should have examined them while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly stated. In accordance with the last part of this rule, a witness has been allowed to refer to a log-book, which, though not written by himself, had, from time to time, and while the occurrences were recent, been examined by him (t). So, where it has been material to prove the date of an act of bankruptcy, the Court has several times permitted witnesses to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them (u). So, if the witness has checked an entry made by another person (x); or has actually seen money paid and a receipt given (y); or has read a memorandum to a party who has assented to its terms (z); in all these, and the like cases, he will be allowed to look at the document itself, for the purpose of refreshing his memory as to the facts mentioned therein. In one or two cases a greater latitude is said to have prevailed; and witnesses are reported to have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection, and not merely from the notes (a). These cases, however, can scarcely be regarded as authorities, and are certainly opposed in spirit to a decision of Lord Tenterden's (b), where a witness, having denied on cross-examination that he was ever sentenced to imprisonment, was not permitted to have his memory refreshed by a copy of his conviction.

(s) *Duchess of Kingston's case*, 20 How. St. Tr. 619.

(t) *Burrough v. Martin*, 2 Camp. 112, per Lord Ellenborough.

(u) *Smith v. Morgan*, 2 M. & Rob. 257, per Tindal, C. J.; *Wood v. Cooper*, 1 C. & Kir. 645, per Pollock, C. B.; *Vaughan v. Martin*, 1 Esp. 440, per Lord Kenyon.

(x) *Burton v. Plummer*, 2 A. & E. 341.

(y) *Rambert v. Cohen*, 4 Esp. 213, per Lord Ellenborough.

(z) *Bolton v. Tomlin*, 5 A. & E. 856; *Jacob v. Lindsay*, 1 East, 459; *R. v. St. Martin's, Leicester*, 2 A. & E. 210.

(a) *Lawes v. Reed*, 2 Lew. C. C. 152, per Alderson, B., citing *Balme v. Hutton*, as a similar case. See also *Henry v. Lee*, 2 Chit. R. 124.

(b) *Meagoe v. Simmons*, 3 C. & P. 75.

§ 1033. As a writing, used to refresh the memory, does not thereby become evidence of itself, it is *not necessary* that it should even be *admissible*; and therefore, a receipt which cannot be read for want of a stamp, may yet be referred to by the witness in giving his evidence (c). Neither is it essential, when notes are used by a witness who is called to prove a conversation, a speech, or the like, that the notes should contain a verbatim account of all that was uttered. Thus, where it appeared, that a short-hand writer had taken a verbatim note of such parts of an address as he deemed material, and was merely able to swear to the substantial correctness of the remainder, he was permitted to read the whole; though it was strongly urged that, as by the witness's own showing the note was a *partial* one, the fullness, and consequent accuracy, of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone (d). If the witness has become *blind*, the paper may be read over to him, in order to excite his recollection (e).

§ 1034. In order that a document may be used as the refresher of memory, it is by *no means necessary* that the witness, after having seen it, should have any *independent recollection* of the facts mentioned therein, or connected therewith; but it will suffice if the witness remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct; or even, if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question. Thus, where an agent, who had made a parol lease, and entered a memorandum of the terms in a book, stated that he had no memory of the transaction but from the book, though on reading the

(c) *Maugham v. Hubbard*, 8 B. & C. 14; *Jacob v. Lindsay*, 1 East, 459; *Ram-
bert v. Cohen*, 4 Esp. 213, per Lord Ellenborough; *Catt v. Howard*, 3 Stark. R. 3,
per Abbott, C. J.

(d) *R. v. O'Connell*, Armstr. & Trev. R. 165—167.

(e) *Catt v. Howard*, 3 Stark. R. 3, per Abbott, C. J.; *Vaughan v. Martin*, 1 Esp.
440, per Lord Kenyon.

entry he entertained no doubt that the fact really happened, it was held sufficient (*f*); and a barrister, called to prove that a witness had materially varied his account since the last trial, has been allowed to refresh his memory by the notes on his brief, though he had no independent recollection of what took place on the former occasion (*g*). Another example of this kind, is where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to swear positively that it passed through his hands. So, where a witness, from seeing his own signature to the attestation of a deed, says that he is therefore sure that he saw the party execute it, this is sufficient proof of the execution, though he adds that he has no recollection of the fact (*h*).

§ 1035. In all cases where documents are used at the trial for the purpose of refreshing the memory of a witness, it is usual and reasonable (*i*), and if the witness has no independent recollection of the fact it is necessary, that the opposite counsel should have an opportunity of inspecting them, in order that on cross, or re-examination, he may have the benefit of the witness's refreshing his memory by every part (*k*). Neither is the adverse party bound to put in the document as part of the evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to (*l*); but if he goes further than this, and asks questions as to other parts of the memorandum, it seems that he thereby makes it his own evidence (*m*). If a paper

(*f*) *R. v. St. Martin's*, Leicester, 2 A. & E. 210. See also *Haig v. Newton*, 1 Const. R. 423; *Sharpe v. Bingley*, id. 343; *Maugham v. Hubbard*, 8 B. & C. 14.

(*g*) *R. v. Guinea*, Ir. Cir. R. 167, per Crampton, J.

(*h*) *Maugham v. Hubbard*, 8 B. & C. 16, per Bayley, J.; *R. v. St. Martin's*, Leicester, 2 A. & E. 213, per Taunton, J.; *Russell v. Coffin*, 8 Pick. 143, 150; *Jackson v. Christman*, 4 Wend. 277, 282; *Pigott v. Holloway*, 1 Binn. 436; *Smith v. Lane*, 12 Serg. & R. 84, per Gibson, J.; *Clark v. Vorce*, 15 Wend. 193.

(*i*) *R. v. Hardy*, 24 How. St. Tr. 824, per Eyre, C. J.

(*k*) *Howard v. Canfield*, 5 Dowl. 417, per Coleridge, J.; *R. v. St. Martin's*, Leicester, 2 A. & E. 215, per Patteson, J.; *Sinclair v. Stevenson*, 1 C. & P. 583, per Beat, C. J.; *Lloyd v. Freshfield*, 2 C. & P. 332; *Dupuy v. Truman*, 2 You. & Coll. Ch. R. 341.

(*l*) *R. v. Ramsden*, 2 C. & P. 604, per Lord Tenterden; *Gregory v. Tavernor*, 6 C. & P. 281, per Gurney, B.

(*m*) *Gregory v. Tavernor*, 6 C. & P. 281. See *Stephens v. Foster*, 6 C. & P. 289.

be put into the hand of a witness, merely to prove handwriting, and not to refresh his memory (*n*), or if, being given to the witness for

(*n*) *Russell v. Rider*, 6 C. & P. 416; *Sinclair v. Stevenson*, 1 C. & P. 583. In Scotland, the subject of the use and proper office of writings, in restoring the recollection of witnesses, is stated with precision by Mr. Alison, in his elegant and philosophical Treatise on the Practice of the Criminal Law. "It is frequently made a question," he observes, "whether a witness may refer to notes or memorandums made to assist his memory. On this subject, the rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow witnesses to look to memorandums made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the jury, as his evidence, he having first sworn, that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears, that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained, than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when they were lost. With the exception, however, of such memorandums, notes, or inventories, made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and *vivâ voce* examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded in the consideration, that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a farther examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions

the purpose of refreshing his memory, the questions founded upon it utterly fail (*o*), the opposite party is not entitled to see it.

§ 1036. Though a witness, in general, must depose to such *facts* only as are *within his own knowledge* (*p*), yet there is no rule which requires him to speak with such expression of *certainty* as to exclude all doubt in his mind. For, whatever may be the nature of the subject, if the witness has any personal recollection of the fact under investigation, he may express it as it lies in his memory, and leave the jury to judge of its weight (*q*). But if the impression on his mind is so slight as to render it probable that it may have been derived from others, or may be some unwarrantable deduction of his own feeble understanding or imagination, it will be rejected (*r*). On some particular subjects, it is obvious that positive and direct testimony may often be unattainable; and, in such cases, a witness is constantly allowed to testify as to his *belief* or *opinion*, or even to draw *inferences* respecting the fact in question from other facts, provided these last facts are within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his *belief*, is equally liable to be convicted of perjury, with the man who swears positively to a fact which he knows to be untrue (*s*). Thus, it is the constant

heard by him from the panel, or the like, *utitur jure communi*, he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or memorandums of dates, &c. made up at the time, to refresh his memory, like any other person put into the box." Pp. 540—542.

(*o*) *R. v. Duncombe*, 8 C. & P. 369, per Lord Denman. In *Holland v. Reeves*, 7 C. & P. 39, a party put a document into the hands of an adverse witness, and cross-examined him upon it, whereupon he was required by the opposite counsel to have it read forthwith; but Alderson, B., held, that the cross-examining party was not bound to put in the document, until he had opened his own case. It would seem, however, in such a case, that the opposite counsel would have a right to inspect the document, in order to found questions upon it in re-examination.

(*p*) As to evidence of reputation, see *ante*, § 415.

(*q*) *Miller's case*, 3 Wils. 427, per De Grey, C. J.; 2 W. Bl. 886, S. C.; *Carmalt v. Post*, 8 Watts, 411, per Gibson, C. J.; *R. v. Stafford*, 7 How. St. Tr. 1378, per Lord H. St. Finch.

(*r*) *Clark v. Bigelow*, 4 Shepl. 246.

(*s*) *R. v. Pedley*, 1 Lea. C. C. 327, per Lord Mansfield; *Miller's case*, 2 W. Bl. 885, 886, per De Grey, C. J.; 3 Wils. 420, S. C.; *Folkes v. Chadd*, 3 Doug. 159, per Lord Mansfield.

practice to receive in evidence any witness's belief of the *identity* of a person, or, that the *handwriting* in dispute is or is not the handwriting of a particular individual, provided he has any actual knowledge of the person or handwriting (*t*). So, in an action for criminal conversation, or for breach of promise of marriage, a person accustomed to observe the mutual deportment of the parties may give in evidence his opinion upon the question, whether or not they were attached to each other (*u*). So, it has recently been determined in America, upon grave consideration, and in conformity with the doctrine prevailing in our ecclesiastical courts (*x*), that where a witness has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, he may depose, not only to particular facts, but to his opinion or belief as to the sanity of the party, formed from such actual observation (*y*). So, also, it has long been held in that country, that the subscribing witnesses to a will may testify their opinions, with respect to the sanity of the testator at the time of executing the will; for the law has placed them about the testator, to ascertain and judge of his capacity (*z*).

§ 1037. This lax mode of examination, however, chiefly prevails on questions of *science* or trade, where, from the difficulty, and occasional impossibility, of obtaining more direct and positive evidence, persons of skill, sometimes called *experts*, are allowed, not only to testify to facts, but to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted, as to the cause of disease or death, or the consequences of wounds, or the treatment of sickness; and as to the sane or insane state of a person's mind, as collected from a number of circumstances; and as to other subjects of professional

(*t*) As to proof of handwriting, see Ch. V., post, and Index, tit. *Handwriting*; *Folkes v. Chadd*, 3 Doug. 159, per Lord Mansfield.

(*u*) *Trelawney v. Colman*, 2 Stark. R. 192, per Holroyd, J.; *M'Kee v. Nelson*, 4 Cowen, 355. (*x*) *Wheeler v. Alderson*, 3 Hagg. Ecc. R. 574, 604, 605.

(*y*) *Clary v. Clary*, 2 Iredell R. 78.

(*z*) *Chase v. Lincoln*, 3 Mass. 237; *Poole v. Richardson*, id. 330; *Rambler v. Tryon*, 7 Serg. & R. 90, 92; *Buckminster v. Perry*, 4 Mass. 593; *Grant v. Thompson*, 4 Conn. 303. See also *Wogan v. Small*, 11 Serg. & R. 141; *Sheafe v. Rowe*, 2 Lee's R. 415

skill (*a*). So, inspectors of franks have been examined to their belief, as to whether the writing of an instrument was in a feigned hand, and also as to whether two documents, supposed to have been written in a disguised hand, were written by the same person (*b*). So, antiquaries have been called to fix, by conjecture, the date of ancient handwriting (*c*); and practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as monuments of boundaries (*d*). So, a secretary of a fire-insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county-commissioner, had frequently estimated damages occasioned by the laying out of railroads and highways, has been held competent to testify his opinion, as to the effect of laying a railroad within a certain distance of a building upon the value of the rent, and the increase of the rate of insurance against fire (*e*). So, where the question was, whether a paper had contained certain pencil-marks, which were alleged to have been rubbed out, the opinion of an engraver, who had examined the paper with a mirror, was held to be admissible evidence, *valeat quantum* (*f*). Seal-engravers, also, may be called to give their opinion upon an impression, whether it was made from an original seal, or from another impression (*g*). So, the opinion of an artist in painting is evidence of the originality of a picture. And it seems, that the genuineness of a postmark may be proved by the opinion of a clerk of the post-office, or, perhaps, of any one, who has been in the habit of receiving letters with that mark (*h*).

(*a*) 1 St. Ev. 175; Tait Ev. 433; R. v. Wright, R. & R. 456; Hathorn v. King, 8 Mass. 371; Collett v. Collett, 1 Curteis, 687.

(*b*) Goodtitle v. Braham, 4 T. R. 497. See Gurney v. Langlands, 5 B. & A. 330, where the Court seemed to doubt the admissibility of such evidence, and held that, at all events, it was entitled to very little weight.

(*c*) Tracy Peerage, 10 Cl. & Fin. 191.

(*d*) Davis v. Mason, 4 Pick. 156.

(*e*) Webber v. East. Rail. Co., 2 Metc. 147. Where a point, involving questions of practical science, is in dispute in Chancery, the Court will advise a reference to an expert in that science for his opinion on the facts; and the report of such party will be adopted by the Court as the ground of its order. Webb v. Manchester and Leeds Rail. Co., 4 Myl. & Cr. 120, 121; 1 Rail. Cas. 576, S. C.

(*f*) R. v. Williams, 8 C. & P. 434, per Parke, B., and Tindal, C. J.

(*g*) Per Lord Mansfield, in Folkes v. Chadd, 3 Doug. 157.

(*h*) Abbey v. Lill, 5 Bing. 299, 304, per Gaselee, J.; Fletcher v. Braddyll, 3 Stark. R. 64; Woodcock v. Houldsworth, 16 M. & W. 124.

§ 1038. Where the question was whether a bank, which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific engineers, as to the effect of such an embankment upon the harbour, were held admissible evidence (*h*). So, persons accustomed to observe the habits of certain fish, have been permitted to give in evidence their opinions as to the ability of the fish to overcome certain obstructions in the rivers which they were accustomed to ascend (*i*). So, in the case of *Bradley v. Arthur* (*k*), the opinion of experienced officers was taken respecting a question of military practice, and the Court held that such evidence was clearly admissible, though the Lord Chief Justice was unwilling to attach to it any great weight. In short, it may be laid down as a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science or art, as to require a course of previous habit or study, in order to attain a knowledge of it (*l*).

§ 1039. On the other hand, it seems equally clear, that the opinions of skilled witnesses cannot be received, when the inquiry relates to a subject which does not require any peculiar habits, or course of study, in order to qualify a man to understand it (*m*). Therefore witnesses are not permitted to state *their views on matters of moral or legal obligation*, or on the manner in which other persons would *probably have been influenced*, had the parties acted in one way rather than another (*n*). Thus, the opinions of medical practitioners upon the question, whether a certain physician had honourably and faithfully discharged his duty to his medical brethren, have been rejected; because on such a point, the jury were as capable of forming a judgment as

(*h*) *Folkes v. Chadd*, 3 Doug. 157.

(*i*) *Cottrill v. Myrick*, 3 Fairf. 222.

(*k*) 4 B. & C. 295, 305, 307, 311. See also *Barwis v. Keppel*, 2 Wils. 314.

(*l*) 1 Smith Lea. Ca. 286, note to *Carter v. Boehm*.

(*m*) *Id.*

(*n*) *Campbell v. Rickards*, 5 B. & Ad. 846, per Lord Denman.

the witnesses themselves (o). In some cases it may be difficult to determine whether the particular question be one of a scientific nature or not, and, consequently, whether skilled witnesses may or may not pass their opinions upon it. Thus, if an action be brought on a policy of insurance, and the question be, whether facts withheld from the underwriter were material, can persons conversant with the business of insurance be asked their opinions on the subject? Or if the action be against the insurance broker for negligence, in not drawing, or in not altering, a policy according to instructions, can other brokers be called to state their opinions as to what the conduct of persons similarly situated ought to have been? To these queries we can give no satisfactory answer, as the Court of Queen's Bench has said they cannot (p), while the Court of Common Pleas has determined that they can (q). In *Greville v. Chapman* (r), which was an action for a libel, imputing to the plaintiff dishonourable conduct in withdrawing a horse, which had been entered for a race, and against which he had betted, a witness for the plaintiff on cross-examination stated, that by the rules of the Jockey Club, a man might bet against his own horse, and then withdraw him without assigning any reason, and that, in such a case, he would be entitled to receive the amount of the wager. On re-examination, he was asked his opinion respecting the morality of such conduct, and the Court held, that this question might properly be put with the view of arriving at the real meaning of the rules.

§ 1040. The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case, as proved by*

(o) *Ramadge v. Ryan*, 9 Bing. 333.

(p) *Campbell v. Rickards*, 5 B. & Ad. 840; 2 N. & M. 542, S. C.; relying on *Carter v. Boehm*, 3 Burr. 905, 913, 914; and *Durrell v. Bederley*, Holt, N. P. R. 283, per Gibbs, J. See also *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, 79.

(q) *Chapman v. Walton*, 10 Bing. 57; 3 M. & Sc. 389, S. C.; relying on *Rickards v. Murdock*, 10 B. & C. 527; and *Berthon v. Loughman*, 2 Stark. R. 258, per Holroyd, J. See further, 1 Smith Lea. Ca. 283—286, and *Lindenau v. Deborough*, 8 B. & C. 586.

(r) 5 Q. B. 781. It is not probable that the courts would sanction any extension of the doctrine here propounded.

other witnesses on the trial (*s*). But here it must be observed that the witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine. For instance, if the question be whether a particular act, for which a prisoner is tried, were an act of insanity, a medical man, conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts (*t*). Where, indeed, the facts are admitted, or not disputed, and the question thus becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though it cannot be insisted on as a matter of right (*u*). An objection, too, is the less likely to be taken to this course under ordinary circumstances, as no practical benefit would result from taking it; for the counsel examining may always attain his object by putting the question hypothetically; that is, by desiring the witness first to assume such and such facts to be true, and then to state his opinion as to the prisoner's state of mind (*x*). So, in an action for unskilfully navigating a ship, though a master of the Trinity House, or other nautical witness, cannot in strictness be asked whether, after having heard the evidence, he thinks the ship was properly or improperly navigated;—for, in answering such a question, the witness would have to draw a conclusion of fact, as well as to give his opinion upon it (*y*);—yet he may be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true (*z*). So, upon a question of sea-worthiness, experienced shipwrights have frequently

(*s*) *R. v. Wright*, R. & R. 456; *R. v. Searle*, 1 M. & Rob. 75, per Park, J.; *Fenwick v. Bell*, 1 C. & Kir. 312; *Beckwith v. Sydebotham*, 1 Camp. 117; *Collett v. Collett*, 1 Curteis, 687.

(*t*) *M'Naghten's case*, 10 Cl. & Fin. 200, 211, 212; 1 C. & Kir. 135, 136; 8 Scott's N. R. 595, S. C. (u) Id.

(*x*) *R. v. Wright*, R. & R. 456.

(*y*) *Sills v. Brown*, 9 C. & P. 604, 605, per Coleridge, J. See also *Jameson v. Drinkald*, 12 Moore, 148.

(*z*) *Fenwick v. Bell*, 1 C. & Kir. 312, per Coltman, J.; *Malton v. Nesbit*, 1 C. & P. 72, per Abbott, C. J.

been called to give an opinion as to whether a ship in the state in which the one in question was sworn to be on a certain day of the voyage, could have been sea-worthy when the policy was effected (a).

§ 1041. It would seem, that in all cases where skilled witnesses are called to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises (b). For instance, though medical books are not directly admissible in evidence (c), there appears to be no good reason, why a physician should not be allowed to strengthen his recollection by referring to such as he considers to be works of authority; or why he should not be asked, after such a reference, whether his judgment was or was not thereby confirmed. We are not aware, however, that this course has ever been directly sanctioned; though a medical witness has been asked whether, in the course of his reading, he has not found a certain mode of treatment prescribed; and he has also been permitted, while explaining the grounds of his opinion, to state that his judgment was founded in part on the writings of his professional brethren (d).

§ 1042. In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of *the laws*, as well written as unwritten, and of the usages and customs of *foreign states*, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject (e). Thus, in the great case of *Dalrymple v. Dalrymple* (f), where the point for the decision of the Court turned on the state of the Scotch Marriage Law, the depositions of eminent Scottish lawyers were given in evidence, and carefully sifted and compared by Sir William Scott in his admirable judgment. It seems to have been thought at one time, that all foreign

(a) *Beckwith v. Sydebotham*, 1 Camp. 116, 117, per Lord Ellenborough; *Thornton v. Roy. Ex. Ass. Co.*, Pea. R. 25, per Lord Kenyon.

(b) See post, § 1042 ad fin.

(c) *Collier v. Simpson*, 5 C. & P. 74, per Tindal, C. J.

(d) *Collier v. Simpson*, 5 C. & P. 73.

(e) See ante, §§ 5, 37.

(f) 2 Hagg. Cons. R. 54.

written law must be proved by a copy properly authenticated (g); but this doctrine is now distinctly exploded (h); the House of Lords having recently determined (i), in accordance with a decision of the Court of Queen's Bench (j), that whenever foreign written law is to be proved, that proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law. For instance, if any question were to arise in a British court of justice respecting the existence or meaning of a French law, it would not suffice to produce the Code Napoleon, because the Court would not have organs to deal with and construe its provisions; but the assistance of foreign lawyers, who knew how to interpret it, must of necessity be prayed in aid (k). Still, the witness may refresh and confirm his recollection of the law, or assist his own knowledge, by referring to text-books, decisions, statutes, codes, or other legal documents or authorities;

(g) *R. v. Picton*, 30 How. St. Tr. 491, per Lord Ellenborough; *Clegg v. Levy*, 3 Camp. 166, per id.; *Millar v. Heinrich*, 4 Camp. 155, per Gibbs, C. J.; *Free-moult v. Dedire*, 1 P. Wms. 431; *Boehtlinck v. Schneider*, 3 Esp. 58, per Lord Kenyon.

(h) Lord Brougham, in his able sketch of Lord Stowell, thus explains the duty of a judge in dealing with questions of foreign law:—"It is possibly hypercritical to remark one inaccurate view which pervades a portion of this judgment [in *Dalrymple v. Dalrymple*]. Although the Scottish law was of course only matter of evidence before Sir W. Scott, and as such for the most part dealt with by him, he yet allowed himself to examine the writings of commentators, and to deal with them as if he were a Scottish lawyer. Now, strictly speaking, he could not look at those text-writers, nor even at the decisions of judges, except only so far as they had been referred to by the witnesses, the skilful persons, the Scottish lawyers, whose testimony alone he was entitled to consider. For *they* alone could deal with either dicta of text-writers or decisions of courts. *He* had no means of approaching such things, nor could avoid falling into errors when he endeavoured to understand their meaning, and still more when he attempted to weigh them and to compare them together. This at least is the strict view of the matter; and in many cases the fact would bear it out. Thus we constantly see gross errors committed by Scottish and French lawyers of eminence when they think they can apply an English authority. But in the case to which we are referring, the learned judge certainly dealt as happily, and as safely, and as successfully, with the authorities, as with the conflicting testimonies which it was his more proper province to sift and to compare." Statesmen of the time of Geo. 3, 2d Ser. 76.

(i) *Sussex Peer. C.*, 11 Cl. & Fin. 85, 114—117.

(j) *Baron de Bode v. R.*, 10 Jurist, 217. *208. 250-267. f. c*

(k) *Sussex Peer. C.*, 11 Cl. & Fin. 115, per Lord Brougham. See also *Lord Nelson v. Lord Bridport*, 8 Beav. 527, where this subject is very ably treated by Lord Langdale, M.R. See, too, *Cocks v. Purday*, 2 C. & Kir. 269.

and if he describes these works as truly stating the law, they may be read, not as evidence *per se*, but as part and parcel of his testimony (*l*).

§ 1043. In order to render a witness competent to give evidence on a point of foreign law, he must either be a *professional man* belonging to the country whose laws are in question, or at least he must hold *some official situation*, which presumes, because it requires, sufficient knowledge (*m*). Thus, a judge, an advocate, a barrister, or an attorney, will be an admissible witness to prove the laws of his own country; and an attorney-general, though not a barrister, as is occasionally the case in some of our colonies, may be examined as a person *peritus virtute officii* (*n*). So, a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, has, in virtue of that office, been considered as a person skilled in the matrimonial law of Rome, and therefore an admissible witness to prove that law (*o*). Whether a French *vice-consul* here would be allowed to prove the law of France as a person officially skilled, may admit of much doubt since the recent decisions, though on one occasion the testimony of such a person was admitted by Lord Tenterden (*p*). But, be this as it may, a merchant or other person holding no official situation, and being unconnected with the legal profession, cannot be heard to expound the law, though the judge may be satisfied that he really possesses ample knowledge on the subject (*q*). Perhaps, however, if the question relates to a foreign *custom* or *usage*, any witness will be admissible who is acquainted with the fact (*r*).

§ 1044. When a party offers a witness in proof of his cause, he

(*l*) *Sussex Peer. C.*, 11 Cl. & Fin. 114—117; *Lord Nelson v. Lord Bridport*, 8 Beav. 527. (m) *Id.* 11 Cl. & Fin. 134.

(*n*) *Id.* 124, per Lord Brougham; *R. v. Picton*, 30 How. St. Tr. 509—512.

(*o*) *Sussex Peer. C.*, 11 Cl. & Fin. 85, 117—134.

(*p*) *Lacon v. Higgins*, 3 Stark. R. 178; *D. & Ry. N. P. C.* 38, S. C.

(*q*) Per Lord Lyndhurst, C., stating the universal opinion of the judges and the Lords, in the *Sussex Peer. C.*, 11 Cl. & Fin. 134, and overruling *R. v. Dent*, 1 C. & Kir. 97.

(*r*) *Ganer v. Lanesborough*, 1 Pea. R. 18; explained by Lord Lyndhurst, C., in the *Sussex Peer. C.*, 11 Cl. & Fin. 124. See *Mostyn v. Fabrigas*, 1 Cowp. 174, per Lord Mansfield; *Feaubert v. Turst*, Prec. Ch. 207.

thereby represents him as worthy of belief. He is presumed to know the character of his own witness; and having presented him to the Court as an honest man, the law will not afterwards permit *him to impeach his credibility by general evidence*, tending to show that he is dishonest. For this would enable him to destroy the credit of his witness, if he spoke against him, and to make him a good witness, if he spoke in his favour (*s*).

§ 1045. This rule is, in general, a fair one; but there are some cases in which its rigid enforcement might work considerable injustice; as, for instance, where the witness is not of the party's own selection, but is one whom *the law obliges him to call*, such as the subscribing witness to a deed or will, and the like. Perhaps, in cases of this nature, the rule might be relaxed, on the ground that such witnesses, being forced upon the party by law, were not his *voluntary* witnesses, but were the witnesses rather of the Court than of the party (*t*).

§ 1046. However this may be, it is clear that the mere fact of having called a witness will not preclude a party from proving the truth of any *particular fact material* to the issue by any other competent testimony, though such evidence may be in direct *contradiction* to what the witness may have testified; and this, not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief (*u*). It would have seemed scarcely necessary to add, had not the point been once decided otherwise (*x*), that where a party, being surprised by a statement of one of his witnesses, calls other persons to contradict him as to a particular fact, the judge is not on that account authorised in rejecting the entire testimony of the contradicted witness. The

(*s*) B. N. P. 297; *Ewer v. Ambrose*, 3 B. & C. 746; 6 D. & R. 127, S. C.; *Stockton v. Demuth*, 7 Watts, 139; *Smith v. Price*, 8 Watts, 447.

(*t*) *Ewer v. Ambrose*, 3 B. & C. 748; *Richardson v. Allen*, 2 Stark. R. 335; *Bowman v. Bowman*, 2 M. & Rob. 502, per Cresswell, J.

(*u*) B. N. P. 297; *Goodtitle v. Clayton*, 4 Burr. 2224, 2225; *Ewer v. Ambrose*, 3 B. & C. 746; 6 D. & R. 127; *Friedlander v. London Ass. Co.*, 4 B. & Ad. 193; *Cowden v. Reynolds*, 12 Serg. & R. 281; *Jackson v. Leek*, 12 Wend. 105.

(*x*) *Alexander v. Gibson*, 2 Camp. 556, per Lord Ellenborough.

discrepancy may, indeed, afford a fair topic for counsel as to the degree of credit to which the witness is entitled, but the whole evidence must go to the jury, who may be perfectly justified in believing one part of it and rejecting another (y).

§ 1047. Although a party is not at liberty to blast the character of his own witness by adducing general evidence to his discredit, the question has been much discussed whether he may not prove that his witness, whose testimony is unfavourable to him, *has previously stated the facts in a different manner*. On the one hand, it is urged that there is a palpable difference between allowing a party to discredit his witness by general and by particular evidence; since the fact of being prepared with general evidence leads fairly to the conclusion, that the party, when he produced the witness, knew him to be infamous, and yet endeavoured by his means to deceive the jury; while the only inference that can reasonably be drawn from a party proving that his witness, at other times, has made contradictory statements, is that he has been himself deceived. Parties are frequently obliged to rely on the testimony of persons whose veracity they have previously had no means of testing. The proof of contradictory statements does not, of necessity, injure the character of the witness, since such statements may arise from defect of memory, and may admit of perfect explanation; and even if this were not the case, the ends of justice require that such evidence should not be excluded. A party is not to be sacrificed to his witness; he is not represented by him, nor identified with him; and it would be alike impolitic and unjust, if, in consequence of a technical rule, he could be entrapped by the arts of a designing man, perhaps in the pay or interest of his adversary. Finally, it is argued, that the real credit of a witness is a most material ingredient in forming a correct opinion respecting the truth of his testimony; that the power of proving his contradictory statements furnishes a most important test of his credit; and that a judge can only be warranted in

(y) *Bradley v. Ricardo*, 8 Bing. 57, 60; *Lowe v. Jolliffe*, 1 W. Bl. 365, where the testimony of three attesting witnesses to a will, though disproved as to the insanity of the testator, was regarded by the jury as sufficient proof of the execution of the will.

withdrawing such evidence from a jury by the certain existence of an inflexible rule of law, which, in this instance, does not exist.

§ 1048. On the other hand, it is contended, with less reason, but with more success, that the distinction attempted to be drawn between general and particular evidence, as the means of discrediting a witness, is rather fanciful than real; that to admit proof of contradictory statements would tend to multiply issues; that it would lead to collusive practices, by enabling a party to get the naked statement of a witness before the jury, operating, in fact, as substantive evidence; and this, too, even when the statement had been made out of court for the fraudulent purpose of being thus introduced; and lastly, that, if no other argument could be found, it would be sufficient to say, that the rule of exclusion may be reasonably gathered from a passage in an ancient treatise of high character (z).

§ 1049. Such being the arguments on both sides of this vexed question, it appears that at present the weight of authority in this country is decidedly in favour of rejecting such proof. Lord Denman, indeed, has admitted it on several occasions (a), and, having formed his opinion after much consideration, will certainly adhere to this practice, till a higher court shall declare that he is wrong. Mr. Phillpotts, too, and Mr. Starkie, both support his Lordship's view with much ability (b); and there are several American authorities to the like effect (c). Moreover, the correctness of this opinion is further confirmed by the case of *Ewer v. Ambrose*, in the second

(z) B. N. P. 297. The learned author, after stating that a party cannot produce *general evidence* to discredit his witness, goes on thus. "But if a witness prove facts in a cause, which make against the party who called him, yet the party may call other witnesses to prove that those facts are otherwise; for such facts are *evidence in the cause*, and the other witnesses are not called *directly to discredit* the first witness, but the impeachment of his credit is incidental and consequential only."

(a) *Wright v. Beckett*, 1 M. & Rob. 414; *Bernasconi v. Farebrother*, cited *id.* 427; *Dunn v. Aalett*, 2 M. & Rob. 122, in 1838.

(b) 2 Ph. Ev. 450—463; 1 St. Ev. 217—220.

(c) See *Smith v. Price*, 8 Watts, 447; *Brown v. Bellows*, 4 Pick. 179; *The State v. Norris*, 1 Hayw. 437-8; *Rice v. New. Eng. Mar. Ins. Co.*, 4 Pick. 439; *Bank of Northern Liberties v. Davis*, 6 Watts & Serg. 285.

trial of which cause (*d*) such evidence was admitted, and by the cases of *R. v. Oldroyd* and *R. v. Boyle*,—in the former of which Lord Ellenborough and Sir James Mansfield intimated (*e*), that a prosecutor might contradict a witness for the Crown by proving his deposition before the committing magistrate,—and in the latter, such evidence was actually admitted by Mr. Baron Bayley, with the concurrence of Mr. Justice Holroyd (*f*). On the other hand, Lord Denman admits, that Mr. Baron Bayley subsequently changed his opinion (*g*); and the obiter dicta of Lord Ellenborough and Sir James Mansfield are entitled to less weight, as ten Irish Judges have since unanimously decided, that a prosecutor has no right to discredit a witness for the Crown by producing his depositions, which contain statements contradictory of the testimony given at the trial (*h*). In addition to this last case, a formidable array of English judges may be cited in opposition to Lord Denman's view. Thus the late Mr. Baron Bolland (*i*), Mr. Baron Parke (*k*), Mr. Justice Patteson (*l*), Mr. Justice Erskine (*m*), and Mr. Justice Wightman (*n*), have expressly rejected such evidence; and from the late case of *Winter v. Butt*, there is reason to believe that several other judges entertain similar views (*o*). It would even seem from this case, that a party calling a witness cannot so much as ask him whether he has not on some former occasion given a different account, though in *Holdsworth v. The Mayor of Dartmouth*, Mr. Baron Parke allowed this question to be put. It further appears to make no difference whether the unfavourable testimony, which is sought to be discredited, has been given on examination in chief, or on cross-examination (*p*).

*the court says
was held
in holding
occasions
1823 & 8*

(*d*) 4 B. & C. 25.

(*e*) R. & R. 90.

(*f*) Cited by Lord Denman, in *Wright v. Beckett*, 1 M. & Rob. 422.

(*g*) 1 M. & Rob. 423.

(*h*) *R. v. Moran*, Jebb, C. C. 91. See Ir. Cir. Rep. 506, n. (*a*).

(*i*) *Wright v. Beckett*, 1 M. & Rob. 414.

(*k*) *Holdsworth v. The Mayor of Dartmouth*, 2 M. & Rob. 153.

(*l*) *R. v. Farr*, 8 C. & P. 768; *R. v. Ball*, id. 746.

(*m*) *R. v. Ball*, id. 746; *Winter v. Butt*, 2 M. & Rob. 357.

(*n*) *Allay v. Hutchings*, 2 M. & Rob. 358, n.

(*o*) 2 M. & Rob. 357, decided March, 1841.

(*p*) *Holdsworth v. The Mayor of Dartmouth*, 2 M. & Rob. 153.

§ 1050. When a witness has been called by one party, the other party, as soon as the examination in chief is closed, has a right to *cross-examine* him. The exercise of this right is justly regarded as one of the most efficacious tests which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanor, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended (q).

(q) 1 St. Ev. 186. On the subject of examining and cross-examining witnesses *vivâ voce*, Quintilian gives the following instructions. "Primum est, nôsse testem. Nam timidus terri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens vero et constans, vel tanquam inimicus et perversus dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpe, qui adversus insectantem pugnant, modestiâ mitigantur. Omnis autem interrogatio, *aut in causa est, aut extra causam*. In causa, (sicut accusatori præcepimus,) patronus quoque altius, unde nihil suspecti sit, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis acumine, aut usu contingit hæc virtus. * * *Extra causam* quoque multa, quæ prosint, rogari solent, de vita testium aliorum, de suâ quisque, si turpitudine, si humilitas, si amicitia accusatoris, si inimicitia cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta*; quia multa contra patronos venuste testis sæpe respondet, eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sæpius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. 5, c. 7. Mr. Alison's observations on the same subject are also interesting both to the student and the practitioner. He observes,—“It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and

§ 1051. Such being the importance which is properly attached to the right of cross-examination, it is not surprising that questions should occasionally arise, as to whether the witness has been so called by the one party as to entitle the other party to exercise this right. And here it is clear, that if the witness be called under a subpoena duces tecum, merely for the *purpose of producing a document*, which either requires no proof, or is to be identified by another witness, he need not be sworn, and, if unsworn, he cannot be cross-examined (*r*). So, if a witness be

when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens, that in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases, there is no good ground, on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel, through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens, that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." *Alison's Pract.*, 546, 547. See also the remarks of Mr. Evans on Cross-examination, in his Appendix to *Poth. on Obl.* No. 16, Vol. 2, pp. 233, 234.

(*r*) *Summers v. Moseley*, 2 Cr. & M. 477; 4 Tyr. 158, S. C.; *Perry v. Gibson*, 1 A. & E. 48; 3 N. & M. 462, S. C.; *Rush v. Smith*, 1 C. M. & R. 94; *Davis v. Dale*, M. & M. 514; 4 C. & P. 335, S. C.; *R. v. Murlis*, M. & M. 515; *Simpson v. Smith*, 2 Ph. Ev. 397.

sworn under a mistake, whether on the part of counsel or of the officer of the Court, and that mistake be discovered before the examination in chief has substantially begun, no cross-examination will be allowed (*s*). Neither has the adverse party any right to cross-examine a witness, whose examination in chief has been stopped by the judge, after his having answered a merely immaterial question (*t*). But, on the other hand, it is by no means necessary that the witness should have been actually examined in chief; for if he has been intentionally called and sworn, and is moreover a competent witness, the opposite party has, in strictness, a right to cross-examine him, though the party calling him has declined to ask a single question (*u*). Where witnesses are simply called to speak to the character of a prisoner, it is not usual to cross-examine them, excepting under special circumstances (*v*); but there is no rule of law expressly forbidding this course.

§ 1052. In criminal cases, although the prosecutor is not *bound* to call every witness whose name is endorsed on the indictment (*x*), he *usually* does so; and even if he declines, the judge, in his discretion, will generally call any that have been omitted, in order to give the prisoner's counsel an opportunity to cross-examine them (*y*). This rule applies to misdemeanors as well as to felonies (*z*), and includes every witness who has been sworn with the view of going before the grand jury, though he may not have been actually examined by that body (*a*). Indeed, in serious cases, the Court will sometimes, for the furtherance of justice, direct persons to be called as witnesses, though their names do not appear on the back of the indictment, provided there is reason to believe that they

(*s*) *Wood v. Mackinson*, 2 M. & Rob. 273, per Coleridge, J.; *Clifford v. Hunter*, 3 C. & P. 16, per Lord Tenterden; *Rush v. Smith*, 1 C. M. & R. 94; *Reed v. James*, 1 Stark. R. 132, per Lord Ellenborough.

(*t*) *Creevy v. Carr*, 7 C. & P. 64, per Gurney, B.

(*u*) *R. v. Brooke*, 2 Stark. R. 472, per Lord Tenterden; *Phillips v. Eames*, 1 Esp. 357, per Lord Kenyon; *Reed v. James*, 1 Stark. R. 132; *Wood v. Mackinson*, 2 M. & Rob. 275, 276. (*v*) *R. v. Hodgkiss*, 7 C. & P. 298, per Alderson, B.

(*z*) *R. v. Flatley*, 1r. Cir. R. 445, per Pennefather, B.

(*y*) *R. v. Simmonds*, 1 C. & P. 84, per Hullock, B.; *R. v. Whitbread*, id. n.; *R. v. Taylor*, id. n.; *R. v. Beezley*, 4 C. & P. 290; *R. v. Bull*, 9 C. & P. 22.

(*z*) *R. v. Vincent*, 9 C. & P. 91, per Alderson, B.

(*a*) *R. v. Bodle*, 6 C. & P. 186, per Gaselee, J., and Vaughan, B.

are acquainted with the circumstances of the case, and are consequently capable of giving material evidence (*b*). Where a witness is thus called at the instance of the prisoner, and no question is put to him on behalf of the prosecution, the prisoner's counsel, though still permitted to put questions in the nature of a cross-examination, cannot call witnesses to contradict his statement (*c*). Neither, in such a case, can the counsel for the prosecution ask any question on re-examination, which does not arise out of the cross-examination (*d*); and perhaps if he has refused to call the witness, he will not be allowed to re-examine him at all (*e*).

§ 1058. With respect to the *mode* of conducting a cross-examination, it is admitted on all hands, that *leading questions may* in general *be asked* (*f*); but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness, which he is to echo back again (*g*); neither does it sanction the putting of a question, which assumes that facts have been proved, which have not been proved, or that particular answers have been given contrary to the fact (*h*). It is submitted that the rule should also receive some further qualification, where the witness is evidently hostile to the party calling him; for although it appears in one case to have been laid down, that leading questions may always be put in cross-examination, whether a witness be unwilling or not (*i*), there surely must be some restriction, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who originally called the witness, has brought the evil on his own head;

(*b*) *R. v. Holden*, 8 C. & P. 609, 610, per Patteson, J. See also *R. v. Chapman*, 8 C. & P. 558, and *R. v. Orchard*, id. 559, n.; *R. v. Stroner*, 1 C. & Kir. 650, per Pollock, C. B.

(*c*) *R. v. Bodle*, 6 C. & P. 187, per Gaselee, J.

(*d*) *R. v. Beezley*, 4 C. & P. 220, per Littledale, J.

(*e*) *R. v. Harris*, 7 C. & P. 581.

(*f*) In Scotland leading questions are not allowed in the cross-examination, any more than they are in the examination in chief. Burnett, *Cr. Law*, c. 18, p. 465; 24 How. St. Tr. 660, n.

(*g*) *R. v. Hardy*, 24 How. St. Tr. 659, 755.

(*h*) *Hill v. Coombe*, and *Handley v. Ward*, per Abbott, C. J., cited 1 St. Ev. 188, note (*n*).

(*i*) *Parkin v. Moon*, 7 C. & P. 409, per Alderson, B.

for a fraudulent witness might purposely conceal his bias in favour of one party, and thus induce the other to call him; or he might be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow, then, such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust; and the more so, when it is considered, that, in many cases, the party originally calling him would have no opportunity of pointing out to the jury the unsatisfactory nature of his testimony. In accordance with these views, it has been determined in America, that a judge, in his discretion, may prohibit leading questions from being put to an adversary's witness, who shows a strong interest or bias in favour of the cross-examining party, and needs only an intimation to say whatever is most favourable to that party (*k*).

§ 1054. There is one point connected with the subject of cross-examination, wherein the American practice differs widely from that which obtains in this country. Here, and in Ireland, the cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case (*l*); and therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine this witness on every issue, and by putting leading questions to him, to establish, if he can, his entire defence. So far has this doctrine been carried, that, even where it was requisite that the substantial, though not the nominal, party in the cause should be called by his adversary, for the sake of formal proof only, it was held, that he was thereby made a witness for all purposes, and might be cross-examined to the whole case (*m*). In America, however, it has recently been determined by the Supreme

(*k*) *Moody v. Rowell*, 17 Pick. 498.

(*l*) So by the Scotch statute law it is now enacted, "that in any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party, against whom a witness is produced and sworn *in causâ*, to examine such witness, not in cross only, but *in causâ*," 3 & 4 Vict. c. 59, § 4.

(*m*) *Morgan v. Brydges*, 2 Stark. R. 314, per Abbott, J.; *R. v. Murphy*, 1 Arm. Mac. & Og. 206, per Pennefather, C. J.

Court, that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination; and that, if he wishes to examine him to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause (n).

§ 1055. Whether, when a party is once entitled to cross-examine a witness, *this right continues through all the subsequent stages of the cause*, so that if he should afterwards recall the same witness to prove a part of his own case he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been entertained. The general principle on which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and it seems that, in common fairness, each party should alternately have the right of cross-examining such a witness as to his adversary's case, while both should be precluded, in the course of the respective examinations in chief, from putting leading questions with regard to their own (o). Accordingly, it has been held in Ireland, that a plaintiff may cross-examine any of his own witnesses, on their being afterwards called on behalf of the defendant (p). In one English case (q), however, Lord Kenyon is reported to have ruled, that a plaintiff's witness, who was recalled by the defendant to establish a plea of tender, might have leading questions put to him as in an ordinary cross-examination; but the soundness of this decision, if cited in support of a general rule, may be doubted.

§ 1056. In conformity with the general rule of law, which requires the contents of every document to be proved by its

(n) *Philadelphia and Trenton Rail Co. v. Stimpson*, 14 Peters R. 448, 461. See also *Harrison v. Rowan*, 3 Wash. 580; *Elmaker v. Buckley*, 16 Serg. & R. 77; *Contrà*, *Moody v. Rowell*, 17 Pick. 490, 498.

(o) 1 St. Ev. 187; 2 Ph. Ev. 401.

(p) *Malone v. Spillesey*, Ir. Cir. R. 504, per Lefroy, B.

(q) *Dickinson v. Shee*, 4 Esp. 67.

production, if that course be possible (*r*), it was decided, in the Queen's case, after solemn argument, that the cross-examining counsel cannot be allowed, in the statement of a question, to represent the contents of a producible letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect; but that the *proper course is to show the witness the letter*, or some one or more lines of it, and then to ask him whether or not it is in his handwriting. If he admits that it is, the cross-examining counsel may, at his proper season, read that letter as evidence; or the Court will even permit it to be read immediately, if the counsel suggests that he wishes to found certain questions upon it; but, in either case, it must be produced as *his* evidence, and the whole of it must be read. The chief reason assigned by the judges for this rule is, that the adoption of a contrary course would enable the cross-examining counsel to put the Court in possession of only a part of the contents of a paper, though a knowledge of the whole might be essential to a right judgment in the cause (*s*). So stringent is the rule, that if a witness, on cross-examination, be asked whether he has ever made *representations* of the particular nature stated to him, the counsel will be required to specify, before any answer can be given, whether the question refers to representations in *writing* or in *words* alone; and if the former is meant, the inquiry, for the reason before mentioned, will be suppressed, unless the writing be produced (*t*).

§ 1057. This rule, excluding, as it does, one of the best tests by which the memory and integrity of a witness can be tried, has been much censured, and Lord Brougham has not hesitated to state, that it cannot "be defended upon any principle, or regarded as otherwise than founded on a gross fallacy" (*u*). His Lordship, on another occasion (*x*), observed with much force, "If I wish to

(*r*) Ante, §§ 292, 301.

(*s*) The Queen's case, 2 B. & B. 286—290; *Bellinger v. The People*, 8 Wend. 595, 598.

(*t*) The Queen's case, 2 B. & B. 292—294.

(*u*) Ed. Rev., vol. 69, p. 22. It has also been condemned by Mr. Starkie in an elaborate argument, 1 St. Ev. 202—207.

(*x*) Speech on Law Reform, vol. 2, Lord Brougham's Speeches, 447. See also a

put a witness's memory to the test, I am not allowed to examine him as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it; though, by so doing, he at once becomes acquainted with its contents, and so defeats the object of my inquiry. That question was raised and decided in the Queen's case, after solemn argument, and I humbly venture to think, upon a wrong ground, namely, that the writing is the best evidence and ought to be produced, though it is plain that the object here is by no means to prove its contents. Neither am I, in like manner, allowed to apply the test to his veracity: and yet how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter, written by him, and which he believes to be lost?" There is certainly great weight in this reasoning, and probably the ends of justice would be best promoted by relaxing the rule, where the *sole object of questioning a witness* as to what he had before written, was to *test his memory or veracity*. Let us consider for a moment the practical working of the course advocated by Lord Brougham. A witness is asked, on cross-examination, whether he ever wrote a letter containing such and such contents. He positively denies that he ever did, and his denial is conclusive, unless the cross-examining counsel is in a position to put in the letter, in which event the whole of it is read. When this can be done, the credit of the witness is deservedly shaken. But assuming that he admits having written the particular passages pointed out by the cross-examining counsel, the consequence by no means follows that the Court are left in ignorance of the remaining portions of the letter. On re-examination, he may of course state from memory these portions, and show how they qualify, contradict, or explain the passages admitted; and he will make this statement with greater caution, inasmuch as he will feel, that the cross-examining counsel has, in all probability, the means of detecting and exposing any false account, by producing the letter itself. It may indeed happen that the letter is not in existence, but in such case parol evidence

remarkable instance of the effect of cross-examining a witness as to the contents of his letters, without first putting them into his hands, cited in the same speech, pp. 439, 440.

of its contents would be clearly admissible, and therefore in that event no rule of law would be contravened.

§ 1058. Whatever may be the weight of the arguments here advanced in opposition to the rule, there is no doubt of its existence in full force both in England and Ireland (y); and in conformity therewith Chief Justice Tindal has held that a plaintiff's counsel has no right to cross-examine one of the defendant's witnesses on the contents of his own affidavit, and to use it afterwards, without putting the original into his hands to refresh his memory (z). On the same principle, the judges have laid down the following rules, as to the *mode of cross-examining witnesses* for the Crown, *with respect to what they have previously sworn before the magistrate*.

"1. Where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

"2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the Court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

"3. The witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that

(y) *Pujolas v. Holland*, Ir. Cir. R. 19, per Perrin, J.

(z) *Bastard v. Smith*, 10 A. & E. 214; *Sainthill v. Bound*, 4 Esp. 74, per Lord Kenyon.

event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply" (a).

§ 1059. In accordance with these rules, it has been held that a witness for the Crown cannot be asked, on cross-examination, whether he has always told the same story, but the question must be qualified by adding, "except when you were before the magistrates or coroner" (b). The rules, however, are confined to those cases in which the depositions have been duly taken and returned, and when, consequently, they would furnish the best evidence of what took place at the prior examination (c). It seems, too, that the rules are merely intended to check the licence of the bar, and are not binding on the judges themselves, who have still a discretionary power of questioning the witness as to any discrepancy between his evidence in court and his former statement, without first putting in the depositions; but it may be questionable whether, in such a case, if new facts were introduced in evidence, the counsel for the prosecution would not be entitled to reply (d).

§ 1060. If it appears, from the cross-examination of the witness, or from any antecedent evidence, that the *paper in question* has been *lost* or *destroyed*, it is obvious that the course of examination enforced on the Queen's trial cannot be adopted. In such case, therefore, the witness may be cross-examined as to the contents of the paper; and if it be material to the issue, he may be afterwards contradicted by secondary evidence (e). The question, however,

(a) 7 C. & P. 676.

(b) R. v. Holden, 8 C. & P. 609, per Patteson, J.; R. v. Shellard, 9 id. 280, per id.

(c) R. v. Griffiths, 9 C. & P. 746, per Coleridge, J., and Gurney, B.

(d) R. v. Edwards, 8 C. & P. 26.

(e) 1 St. Ev. 202; 2 Ph. Ev. 441.

still remains, as to whether the cross-examining party may first *interpose evidence out of his turn*, to prove the loss or destruction of the document, or to show that it is in the hands of the opponent, that he has had notice to produce it, and that he refuses to do so ; and then cross-examine the witness as to its contents (*f*). In former times this course was deemed irregular (*g*), but modern authorities are not wanting to show that it would now be generally allowed. Thus, if the paper in question be not in the actual possession of the cross-examining party, he may, before commencing his cross-examination, or during its progress, direct any person, whom he has served with a subpoena duces tecum, to produce the writing (*h*), or call upon the adversary to do so, if the paper is in his hands, and he has had notice to produce it (*i*). The counsel for a prisoner has also been allowed to interpose proof of the loss of the original depositions and of the correctness of a copy, and then to cross-examine the witness, the copy being first duly read (*k*). In another case, a witness was permitted to be cross-examined upon an office copy of an affidavit made by her, the affidavit itself being filed, and the cross-examining counsel having put in an order to admit the document to be a true copy (*l*). If in any particular case, this course of proceeding would be likely to occasion inconvenience, by disturbing the regular progress of the cause and distracting the attention, the judge would be empowered to postpone the examination as to this point to a later stage in the cause (*m*).

§ 1061. We have already seen that evidence must be confined to the points in issue, and that this rule excludes all proof of collateral facts, or those which afford no reasonable inference as to the principal matters in dispute (*n*). In cross-examinations, however, this rule is not usually applied with the same strictness as in

(*f*) See 1 St. Ev. 205, note (*d*).

(*g*) *Graham v. Dyster*, 2 Stark. B. 23, per Lord Ellenborough ; *Sideways v. Dyson*, id. 49, per id.

(*h*) *Att.-Gen. v. Bond*, 9 C. & P. 189, per Lord Abinger.

(*i*) *Calvert v. Flower*, 7 C. & P. 386, per Lord Denman.

(*k*) *R. v. Shellard*, 9 C. & P. 379, per Patteson, J.

(*l*) *Davies v. Davies*, 9 C. & P. 252.

(*m*) 2 Ph. Ev. 439, 440.

(*n*) Ante, § 237.

examinations in chief; but, on the contrary, great latitude of interrogation is sometimes permitted by the judge, where, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth; or where the cross-examiner will undertake to show, at some subsequent stage of the cause, by other evidence, the relevancy of the question put (*o*). On this head it is difficult to lay down, or rather to apply, any precise general rule (*p*). Still, there are some subsidiary rules, which are clearly established, and a due attention to which will enable the practitioner to define, with tolerable accuracy, the limits, within which questions on cross-examination must be confined.

§ 1062. First, no question can legally be put to a witness on cross-examination, respecting any fact *irrelevant to the issue*, for the mere purpose of *contradicting* him by other evidence, if he should deny it, and of thus discrediting his testimony. For instance, in a penal action for usury, alleged to have been committed in a contract made by the defendant with a witness who was called to establish the offence, the defendant's counsel was not allowed to cross-examine this witness as to other contracts made by him with other persons about the same time, in order to draw an inference that the contracts were all of the same nature, if the witness stated that the latter were not usurious, and to contradict him by extrinsic proof, if he said that they were (*q*). Again, on the trial of an issue, whether the defendant's manufactory emitted smoke prejudicial to the plaintiff's garden, where both parties had examined witnesses as to the effect of the works on neighbouring grounds, a witness was called by the defendant, who described several gardens in the neighbourhood as uninjured. In cross-examination, he was asked whether he knew Glasgow field, and having answered that he did, but that "he never knew of any damage done there," the counsel for the plaintiff proposed to ask him "Whether he had known of any sum having been paid by the defendant to the proprietors of Glasgow field, for alleged damage occasioned by the

(*o*) *Haigh v. Belcher*, 7 C. & P. 389, per Coleridge, J.

(*p*) *Lawrence v. Baker*, 5 Wend. 305.

(*q*) *Spenceley v. De Willott*, 7 East, 108.

works?" The learned judge, however, refused to allow the question to be put, and on a bill of exceptions, the House of Lords confirmed the ruling (*s*). Here, had the answer been in the affirmative, it would not have been evidence, because money paid to quiet a complaint can be no proof that the demand was well-founded; and even if it were evidence in favour of the party receiving the money, it could not be evidence on behalf of a stranger. Neither was the question admissible in order to test the credit of the witness; for raising as it did an irrelevant inquiry, the answer could not have been contradicted, had it been in the negative.

§ 1063. This leads us to the second rule, which decides, that if any such irrelevant question be inadvertently put and answered, the *answer is conclusive*, and no evidence can afterwards be adduced for the purpose of contradiction. Thus, where a witness had denied that the attestation of a bond was in his father's handwriting, and on being shown another paper, which was not evidence in the cause, swore that that also was not written by his father, the Court would not permit witnesses to be called to prove that this second paper was actually written by the father in their presence (*t*). The reasons for this rule have been already explained (*u*); and, although it may occasionally, as in the case last put, seem to act prejudicially, yet on the whole it promotes the discovery of truth, by preventing the attention of the jury from becoming distracted by a multitude of frivolous and collateral issues.

§ 1064. Thirdly, with the view of discrediting the testimony of a witness, he may be always *asked* on cross-examination (*x*), though, as we shall presently see (*y*), he is not always compelled to answer, *questions with regard to alleged crimes*, or other improper

(*s*) *Tennant v. Hamilton*, 7 Cl. & Fin. 122.

(*t*) *Hughes v. Rogers*, 8 M. & W. 123.

(*u*) Ante, § 237.

(*x*) *Harris v. Tippet*, 2 Camp. 638, per Lawrence, J.; *R. v. Yewin*, id. 639, per id.; *R. v. Edwards*, 4 T. R. 440; *R. v. Barnard*, and *R. v. James*, cited in note, 1 C. & P. 86, 87; *R. v. Watson*, 2 Stark. R. 149; 32 How. St. Tr. 292, et seq. S.C. The cases of *R. v. Lewis*, 4 Esp. 225; *Macbride v. Macbride*, id. 242; and *R. v. Pitcher*, 1 C. & P. 85, where questions tending to degrade the witness were not allowed to be put, cannot now be regarded as authorities.

(*y*) Post, § 1068, et seq.

conduct, *on his part*; and here, if the fact inquired into be relevant to the issue, it may be proved by other evidence, although denied by the witness; but if it be irrelevant, the answer of the witness will be conclusive (*z*). The same rule prevails with respect to all other questions put to a witness, for the purpose of *directly testing his credit*; that is, if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot.

§ 1065. It becomes, then, necessary to ascertain what matters connected with the witness are, or are not, *relevant*; and here, in addition to what has been stated in a former chapter (*a*), it should be observed, that it is relevant to inquire of a witness whether he has not, on some other occasion, *given a different account* (*b*) of the matter of fact to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him (*c*). So, if the case be such as to render evidence of opinion admissible and material, as, for instance, if the witness has been examined as to his *belief* of the identity of a person, or of his handwriting, or of his sanity, or if he be a skilled witness called to state his opinion on a matter of science, he may be asked on cross-examination, whether he has not formerly expressed a different opinion upon the same subject; and if he deny the fact, it may be proved by other evidence. But if a witness has simply testified to a fact, his previous *opinion* as to the *merits of the cause* cannot be regarded as relevant to the issue (*d*). Therefore, in an action upon a marine policy, where the broker, who effected the policy for the plaintiff, stated as a witness for the defendant, that he had omitted to disclose a certain fact, now contended to be material to the risk, and on being cross-examined, as to whether he had not expressed his opinion that the defendant had not a leg to stand upon, denied that he had said so; this was deemed conclusive, and evidence to contradict him in this particular was rejected (*e*).

(*z*) *R. v. Watson*, 2 Stark. R. 149; 32 How. St. Tr. 486—495, S. C.; *R. v. Rudge*, Pea. Add. Cas. 232, per Lawrence, J. (a) Ante, § 237, et seq.

(b) If the former statement was in writing, the paper must be produced. See ante, § 1056. As to depositions, see ante, §§ 1058, 1059.

(c) *Crowley v. Page*, 7 C. & P. 789, per Parke, B. See *Meagoe v. Simmons*, 3 C. & P. 75. (d) *Daniels v. Conrad*, 4 Leigh's R. 401, 405.

(e) *Elton v. Larkins*, 5 C. & P. 385, 390, 391, per Tindal, C. J.

§ 1066. Whether questions respecting the *motives, interest, or conduct* of the witness, as connected with the cause, or with either of the parties, are irrelevant, is a point on which the authorities differ. On the one hand, it has been held relevant to the guilt or innocence of a person charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he had not expressed feelings of hostility towards the prisoner (*g*); and the like inquiry has been made in a civil action (*h*). So also, in assumpsit upon a promissory note, the execution of which was disputed, it was held material to ask the subscribing witness, whether she was not the plaintiff's kept mistress (*i*). In all these cases, the witness under cross-examination denied the fact imputed, and was allowed to be contradicted by other witnesses. So, in modern times, it has frequently been held, that in actions for seduction, and on indictments for rape, the principal female witness may be cross-examined, with the view of showing that she has previously been guilty of incontinence with the defendant, or even with other men, or with some particular person named; and if she deny the facts imputed, witnesses may be called for the purpose of contradiction (*j*). So, on the trial of Lord Stafford for high treason, his Lordship was allowed to adduce proof that one of the witnesses for the prosecution had attempted to suborn several persons to give false evidence against him (*k*); and in the Queen's case, the judges appear to have considered such a course unobjectionable, provided the witness had been first cross-examined upon the subject. (*l*). On the other hand, it is said to have been several times ruled of late years, that, if a witness denies that he has tampered with the other witnesses,

(*g*) *R. v. Yewin*, 2 Camp. 638, per Lawrence, J.

(*h*) *Attwood v. Welton*, 7 Conn. 66.

(*i*) *Thomas v. David*, 7 C. & P. 350, per Coleridge, J.

(*j*) *R. v. Robins*, 2 M. & Rob. 512, per Coleridge and Erskine, Js.; *Verry v. Watkins*, 7 C. & P. 308, per Alderson, B.; *Andrews v. Askey*, 8 C. & P. 7, per Tindal, C. J.; *Grinnell v. Wells*, cited 2 Russ. C. & M. 784, note (*y*), per Erskine, J.; *R. v. Aspinall*, 3 St. Ev. 952, per Hullock, B.; *R. v. Martin*, 6 C. & P. 562, per Williams, J.; *R. v. Barker*, 3 C. & P. 589, per Park, and Parke, Js. These cases appear to overrule *R. v. Hodgson*, R. & R. 211; *Dodd v. Norris*, 3 Camp. 519; and a dictum in *R. v. Clarke*, 2 Stark. R. 244, per Holroyd, J. See ante, § 267.

(*k*) 7 How. St. Tr. 1400.

(*l*) 2 B. & B. 311.

evidence to contradict him cannot be received (*m*). So, where a witness called to character, denied having ever said that the prisoner should be acquitted if it cost him 20*l.*, the Court decided that the counsel for the prosecution must rest satisfied with the answer (*n*); and in a civil action, where the defendants sought to disparage the testimony of a witness of the plaintiff, by proving some circumstances indicating a hostile spirit towards themselves, the learned judge is reported to have held, that it could not be done (*o*). Again, where the principal witness against a man indicted for theft was his apprentice, who, being asked in cross-examination whether he had not been charged with robbing his master, denied the fact, the prisoner's counsel was not allowed to prove that the answer was false (*p*).

§ 1067. Such being the conflict of authorities, it is obviously impossible for a text writer to state the rule with precision; but if we may venture an opinion, it will be pronounced in favour of the former, rather than of the latter, class of cases. It is no doubt an object of great importance to confine the attention of the jury as much as possible to the specific issues: but it seems highly essential to the discovery of truth, that those who are to determine the respective value of conflicting testimony should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest can be more sure than that which is afforded by the conduct of the witness himself. The argument that a man cannot come prepared to defend himself against particular charges without notice, may be a very good reason why evidence to prove that a witness has been guilty of a specific crime, *unconnected with the cause or parties*, should not be adduced;—because, even if it were proved, it would raise, in the absence of interest, but a very faint presumption that he had been guilty of perjury;—but it should not be allowed to extend to a case where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge, too, of this nature would, almost of necessity, apply to some act of recent date, and as such might be easily

(*m*) *R. v. Lee*, 2 Lew. C. C. 154, per Coleridge, J.; *Harris v. Tippet*, 2 Camp. 637, per Lawrence, J.

(*n*) *R. v. Lee*, 2 Lew. C. C. 154, per Coleridge, J.

(*o*) *Harrison v. Gordon*, 2 Lew. C. C. 156, per Alderson, B.

(*p*) *R. v. Yewin*, 2 Camp. 638, per Lawrence, J. *Att'y Gen. v. Whitehead*, 1 B. & P. 184, 185. That was an information under the revenue laws, and a witness, who had given material evidence for the Crown, was asked on cross-examination whether he had not said that the officers of the Crown had offered him £20. to give that evidence. He denied that he had ever said so, & the Court held that evidence was inadmissible to contradict him. The case deserves

explained or rebutted by the witness, if it were made without foundation. Moreover, this inquiry would seem at the present day to be all the more necessary, as witnesses are no longer incompetent to testify on the ground of interest or crime.

§ 1068. It has already been casually observed, that there are some questions which a witness is *not compellable to answer*. This is the case: *first*, where the answers would have a *tendency* to expose the witness, or, as it seems, the husband or wife of the witness (*q*) to any kind of *criminal charge*, whether in the common-law or ecclesiastical (*r*) Courts, or to a *penalty* or *forfeiture* of any nature whatsoever (*s*). This rule, which is of great antiquity, and was even recognised by Chief Justice Jefferies, when it told *against* the prisoner (*t*), is not confined to courts of law, but is also administered in Chancery, where a defendant will not be compelled to discover that, which, if answered, would tend to subject him to any punishment (*u*), penalty (*x*), forfeiture (*y*), or ecclesiastical censure (*z*), however material the answer may be to the plaintiff's case (*a*). Neither will a witness in Equity be forced to answer interrogatories of a like tendency (*b*). The same doctrine prevails in the Spiritual Courts (*c*), and is part and parcel of the law of Scotland (*d*). Some

(*q*) *Cartwright v. Green*, 8 Ves. 405.

(*r*) *Parkhurst v. Lowten*, 1 Mer. 391; 2 Swanst. 215, S. C., as to Simony *Brownsword v. Edwards*, 2 Ves. sen. 245, as to incest; *Chetwynd v. Lindon*, id. 450, and *Finch v. Finch*, id. 493, as to concubinage.

(*s*) *R. v. Friend*, 13 How. St. Tr. 16—18; *R. v. Lord G. Gordon*, 2 Doug. 593; 21 How. St. Tr. 650, S. C.; *R. v. Lord Macclesfield*, 16 How. St. Tr. 1146—1150; *R. v. Slaney*, 5 C. & P. 213, per Lord Tenterden; *R. v. Pegler*, id. 521, per Littledale and Park, Js.; *Maloney v. Bartley*, 3 Camp. 210, per Wood, B.; *Dandridge v. Corden*, 3 C. & P. 11, per Lord Tenterden.

(*t*) *R. v. Rosewell*, 10 How. St. Tr. 169.

(*u*) *Macallum v. Turton*, 2 You. & Jer. 183; *Paxton v. Douglas*, 19 Ves. 225; *Thorpe v. Macaulay*, 5 Madd. 229, 231, n. (*s*); *Claridge v. Hoare*, 14 Ves. 59, 65; *McIntyre v. Mancius*, 16 Johns. 592.

(*x*) See cases cited in last note.

(*y*) *Parkhurst v. Lowten*, 1 Mer. 401, 402; *Lord Uxbridge v. Staveland*, 1 Ves. sen. 56. In *Att.-Gen. v. Duplessis*, the House of Lords held that the legal disability of an alien to hold lands was neither a penalty nor forfeiture, 1 Brown, P. C. 415; 2 Ves. sen. 287, S. C. See now, 7 & 8 Vict. c. 66.

(*z*) See cases cited above in note (*r*).

(*a*) *Wigram on Discovery*, pp. 80, 81, 192, 193, and cases there cited; *Story*, Eq. Pl. §§ 524, 576, 577, 592—598.

(*b*) *Paxton v. Douglas*, 16 Ves. 239.

(*c*) *Swift v. Swift*, 4 Hagg. Ecc. R. 154.

(*d*) *Alison Pr. Cr. Law*, 527.

of the older decisions on this subject are calculated to make us feel the advantage of living at a time when freedom of conscience is, at length, fully established(*e*). Thus, in the reign of William the Third, and again so late as the year 1781, we find witnesses protected from answering the simple question whether they were protestants or papists (*f*).

§ 1069. Again, there are other cases, which amply justify a doubt, as to whether the protection has not been carried beyond its legitimate bounds. Thus, in an action for a libel, contained in a voluntary affidavit, which the defendant had sworn extra-judicially before a magistrate, the Court held that the magistrate's clerk was not bound to answer, whether he wrote the affidavit by the defendant's orders, and delivered it to the magistrate (*g*); and it has recently been decided in Ireland, that, upon a trial for the murder of a person killed in a duel, any person who was present, and in any way countenanced the proceeding, might refuse to answer any question relating thereto (*h*). It is not here intended to insinuate, that these cases are wrong decisions; for there are a cloud of authorities which clearly establish, that if the fact to which the witness is interrogated, forms but a *single remote link* in the chain of testimony, which *may* implicate him in a crime or misdemeanor, or expose him to a penalty or forfeiture, he is not bound to answer (*i*);—but it is humbly suggested, that, where the question *is material to the issue*, it should be left to the discretion of the judge, whether or not he will enforce an answer, having due regard to the general interests of justice; provided always,

(*e*) See 7 & 8 Vict. c. 102; and 9 & 10 Vict. c. 59.

(*f*) *R. v. Friend*, 13 How. St. Tr. 16—18; *R. v. Lord G. Gordon*, 21 id. 650; 2 Doug. 593, S. C. (*g*) *Maloney v. Bartley*, 3 Camp. 210, per Wood, B.

(*h*) *R. v. Handcock*, Ir. Cir. R. 329, per Brady, C. B. For other instances of injustice occasioned by the stringency of this rule, see *Brownsword v. Edwards*, 2 Ves. Sen. 245; *Sharp v. Carter*, 3 P. Wms. 375; *Claridge v. Hoare*, 14 Ves. 59. See also some very sensible observations on this subject in the *Law Rev.*, No. xiii., pp. 19—30.

(*i*) *Cates v. Hardacre*, 3 Taunt. 424; *Macallum v. Turton*, 2 You. & Jer. 183, 195; *Parkhurst v. Lowten*, 2 Swanst. 215; *Paxton v. Douglas*, 16 Ves. 243, and 19 Ves. 227, 228; *Harrison v. Southcote*, 1 Atk. 518; *Swift v. Swift*, 4 Hagg. Ecc. R. 154; *The People v. Mather*, 4 Wend. 229, 252—254; 1 Burr's Trial, 245; *Southard v. Rexford*, 6 Cowen, 254, 255; *Bellinger v. The People*, 8 Wend. 595.

that if an answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates, or, at least, such answer should not be admissible evidence in any future criminal proceedings instituted against the witness (*k*).

§ 1070. It deserves notice, that, on several occasions, the Legislature has acted on this principle, and has either directly deprived the witness of the privilege, or, by an Act of indemnity, has rendered it valueless. Thus, all persons offending against the Act relating to the combination of workmen may be compelled to give evidence for the Crown, upon any information exhibited under that Act against any persons not being such witnesses; but in all such cases, the witness, after having given his evidence, is indemnified against any prosecution for having offended in the matter to which his testimony relates (*l*). So, under the Act relating to embezzlements committed by agents, "No banker, merchant, broker, factor, attorney, or other agent, shall be liable to be convicted by any evidence whatever as an offender against that Act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or other proceeding, which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt" (*m*). Similar clauses are inserted in the Act for the more effectual prosecution of the keepers of gaming-houses (*n*); as also in the Irish Act, under which depositions are taken by the magistrates on charges of felony (*o*). So, when Parliamentary inquiries are instituted respecting bribery at elections, gaming, and other illegal transactions, where the testimony of many persons implicated is required, Acts of indemnity are occasionally passed, with the view of absolving from punishment or penalty any witness, who shall make a faithful discovery of what he knows in relation to the matters under investigation (*p*).

(*k*) See Law Rev., No. xiii., pp. 28—30.

(*l*) 6 Geo. 4, c. 129, § 6.

(*m*) 7 & 8 Geo. 4, c. 29, § 52.

(*n*) 8 & 9 Vict. c. 109, § 9.

(*o*) 9 Geo. 4, c. 54, § 2, cited post, § 1162, n. (*g*).

(*p*) See 5 & 6 Vict. c. 31, and 7 & 8 Vict. c. 7.

§ 1071. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, is a point which the Court will determine, under all the circumstances of the case, as soon as the protection is claimed; but without requiring the witness fully to explain how the effect would be produced; for if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated (*o*). However, as Lord Hardwicke once observed, "These objections to answering should be held to very strict rules" (*p*); and, in some way or other, the Court should have the sanction of an oath for the facts on which the objection is founded (*q*).

§ 1072. If the prosecution, to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time (*r*); or if the offence has been pardoned (*s*), or the penalty or forfeiture waived; or if, in any other way, the reason for the privilege has ceased, the privilege itself will cease also, and the witness will be bound to answer (*t*). Moreover, this protection has, fortunately for the interests of creditors, not been imported, at least, in all its strictness, into the *bankrupt law*; and the bankrupt, consequently, cannot refuse to discover his estate and effects, and the particulars relating to them, though, by giving information on this subject, his answers may *tend to show* that he has been guilty of fraudulent concealment, or that he owns property, which he has obtained illegally, or the possession of which will render him liable to penalties (*u*).

§ 1073. Secondly, it has been much debated, whether a witness is bound to answer any question, the *direct and immediate effect*

(*o*) *The People v. Mather*, 4 Wend. 253, 254.

(*p*) *Vaillant v. Dodemead*, 2 Atk. 524.

(*q*) *Parkhurst v. Lowten*, 2 Swanst. 203, per Lord Eldon. See post, § 1079.

(*r*) *Roberts v. Allatt*, M. & M. 192, per Lord Tenterden; *Parkhurst v. Lowten*, 1 Mer. 400, per Lord Eldon; *The People v. Mather*, 4 Wend. 229, 252—255; *Williams v. Farrington*, 2 Cox, 202; *Davis v. Reid*, 5 Sim. 443.

(*s*) In two old cases, *R. v. Reading*, 7 How. St. Tr. 296, and *R. v. Shaftesbury*, 8 id. 817, a contrary rule seems to have been laid down; but the authority of these decisions is very questionable. See M. & M. 193, note.

(*t*) *Wigram on Discovery*, pp. 83, 84, and cases there cited.

(*u*) *Ex parte Cossens*, re Worrall, Buck, 531, 540, per Lord Eldon.

of answering which might be to degrade his character. On this subject, the law still remains in a somewhat unsettled state: but thus much would seem to be clear; viz., that where the transaction, to which the witness is interrogated, forms *any material part of the issue*, he will be obliged to give evidence, however strongly it may reflect on his conduct (*q*). Indeed, it would be alike unjust and impolitic, to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony might be necessary for the protection of the property, the liberty, or the life of a fellow-subject, or might, at least, be required for the due administration of public justice. Were such a rule of protection to prevail, a man who had been convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape.

§ 1074. Where, however, the question is *not directly material* to the issue, but is only put for the purpose of testing the *character*, and consequent *credit*, of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that, in such case, the witness is not bound to answer (*r*); but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times (*s*). Even Lord Ellenborough, who is reported to have held on one occasion (*t*), that a witness was not bound to state whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him (*u*), seems in a later case to have disregarded the rules thus enunciated; for, on a witness declining

(*q*) See ante, §§ 1064, 1066.

(*r*) *R. v. Cook*, 13 How. St. Tr. 334, 335, per Treby, C. J.; *R. v. Friend*, id. 17, per id.; *R. v. Laver*, 16 id. 161, per Pratt, C. J.; *R. v. O'Coigly*, 26 id. 1351—1353; *Macbride v. Macbride*, 4 Esp. 242, per Lord Alvanley; *Dodd v. Norris*, 3 Camp. 519; *R. v. Hodgson*, R. & R. 211.

(*s*) *Parkhurst v. Lowten*, 1 Mer. 400, per Lord Eldon; 2 Swanst. 216, S. C.; *Cundell v. Pratt*, M. & M. 108, per Best, C. J.; *Roberts v. Allatt*, id. 192, per Lord Tenterden; *R. v. Edwards*, 4 T. R. 440. See also cases cited ante, §§ 1064 n. (*x*), and 1066, n. (*k*).

(*t*) *Millman v. Tucker*, Pea. Add. Cas. 222.

(*u*) *R. v. Lewis*, 4 Esp. 226.

to say whether or not he had been confined for theft in gaol, his Lordship harshly observed, "If you do not answer the question, I will send you there" (*x*). No doubt there may be cases, where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a *remote date*, might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

§ 1075. But the rule of protection should not be further extended; for, if the inquiry relates to *transactions* comparatively *recent*, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness, either to commit perjury or to destroy his own reputation (*y*); but on the other hand, it is obviously of the last importance, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause (*z*).

§ 1076. However the law may be ultimately determined on the point just discussed, it seems to be generally conceded, that where the answer, which the witness may give, will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may be compelled to reply either at law or in equity (*a*).

(*x*) *Frost v. Holloway*, cited 1 St. Ev. 197, note (*n*); and 2 Ph. Ev. 428.

(*y*) 1 St. Ev. 193.

(*z*) *Id.*

(*a*) *Macbride v. Macbride*, 4 Esp. 242, per Lord Alvanley; *Parkhurst v.*

With respect, too, to questions which directly degrade the witness, no objection can be taken to them, on the ground that they involve the fact of a previous conviction, which ought to be proved by the production of the *record*; because, as the parol admissions of parties are now receivable in evidence, although they relate to the contents of deeds or records (*b*), the same rule would seem to render the answers of a witness admissible in the case just put.

§ 1077. At one time it was considered doubtful, whether a witness could be compelled to answer, where by so doing he would *subject himself to a civil action or pecuniary loss, or charge himself with a debt*. This question was much discussed in Lord Melville's case; and being finally submitted to the judges, eight of them, with the Chancellor and Lord Eldon, were of opinion that a witness in such case was bound to answer, while four thought that he was not (*c*). To remove the doubts, which such a diversity of opinion threw over the subject, a statute was passed (*d*), declaring "that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the Crown, or of any other person or persons." But neither this Act, nor the rule of the common law, will compel any person, in whose immediate and individual behalf any action may be brought or defended either wholly or in part, to testify as a witness, much less to disclose anything against his own interest (*e*).

Lowten, 1 Mer. 400, per Lord Eldon; 2 Swanst. 194, 216, S. C.; The People v. Mather, 4 Wend. 232, 252, 254, per Masey, J.; Cundell v. Pratt, M. & M. 108, per Best, C. J.

(*b*) Slatterie v. Pooley, 6 M. & W. 664; Earle v. Picken, 5 C. & P. 542, per Parke, B. See ante, §§ 302—304. (*c*) 6 Parl. Deb. 167—245.

(*d*) 46 Geo. 3, c. 37. It is so settled by statute, in New York, 2 Rev. St. 450, § 71. In America the English Act is generally considered as declaratory of the true doctrine of the common law. See Bull v. Loveland, 10 Pick. 9; Baird v. Cochran, 4 Serg. & R. 397; Naylor v. Semmes, 4 Gill & J. 273; Stoddart v. Manning, 2 Har. & G. 147; Copp v. Upham, 3 N. Hamp. 159.

(*e*) R. v. Woburn, 10 East, 395; 6 & 7 Vict. c. 85, § 1; ante, §§ 952, 973.

§ 1078. Though the statute just cited does not in terms refer to the *production of documents*, its spirit seems strictly applicable to such a case ; and accordingly it has been held, that a witness cannot be excused from producing papers in his possession, merely because their production may subject him to a civil action, or be otherwise prejudicial to his pecuniary interests (*f*). If, indeed, the documents called for be the title deeds of the witness, or perhaps, if they be instruments in the nature of title deeds, they will fall within the rule of protection (*g*) ; because, in the present complicated state of the law of real property, it might cause infinite mischief, if witnesses were compellable to disclose by what title they held their estates. So, a witness, or a party in the cause, is not bound, either at law or in equity, to produce any documents which may render him liable to punishment, or expose him to penalty or forfeiture (*h*), unless they be of a public nature, or such as are directed by statute to be kept and produced (*i*).

§ 1079. In all the cases hitherto put, where the witness is not compellable to answer, or to produce documents, the *privilege is his*, and *not that of the party* ; and consequently, counsel in the cause will not be permitted to make the objection (*k*). Neither will the witness be allowed to employ counsel of his own to support his claim to protection (*l*). Nor even is the judge *bound*, as it would seem, to warn the witness of his right to demur to the question (*m*), though, in the exercise of his discretion, he will occasionally think it right to do so (*n*). It appears at one time to have been thought,

(*f*) *Doe v. Date*, 3 Q. B. 609, 618, per Patteson, J. ; *Doe v. Earl of Egremont*, 2 M. & Rob. 386, per Rolfe, B. These cases appear to overrule *Miles v. Dawson*, 1 Esp. 405, and *Laing v. Barclay*, 3 Stark. R. 42.

(*g*) *Doe v. Date*, 3 Q. B. 609 ; *Pickering v. Noyes*, 1 B. & C. 263 ; 1 St. Ev. 88.

(*h*) *Parkhurst v. Lowten*, 1 Mer. 400 ; 2 Swanst. 216, S. C. ; *Whitaker v. Izod*, 2 Taunt. 115 ; *R. v. Dixon*, 3 Burr. 1687. (*i*) *Bradshaw v. Murphy*, 7 C. & P. 612.

(*k*) *Thomas v. Newton*, M. & M. 48, n., per Lord Tenterden ; *R. v. Adey*, 1 M. & Rob. 94, per id. See *Marston v. Downes*, 1 A. & E. 34, per Lord Denman ; and *Doe v. Date*, 3 Q. B. 609.

(*l*) *Doe v. Earl of Egremont*, 2 M. & Rob. 386 ; *Doe v. Date*, 3 Q. B. 621, per Coleridge, J., citing a decision of Park, J.

(*m*) This at least is the opinion of one of our ablest Judges.

(*n*) *Paxton v. Douglas*, 16 Ves. 242.

that if a witness chose to reply in part, he might be compelled to answer everything relative to the transaction ; but this doctrine has recently been overruled by a majority of the fifteen judges ; and it is now finally determined that a witness may claim his protection *at any stage of the inquiry*, and if he do so, he cannot be forced to answer any further questions tending to criminate him. In short, he cannot be carried further than he chooses voluntarily to go himself (*o*). It has been stated more than once, that, if the witness declines to answer, no inference of the truth of the fact can be drawn from that circumstance (*p*) ; but the soundness of this rule is very questionable ; and although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem, that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness (*q*). A perfectly honourable but excitable man may occasionally repudiate a question, which he regards as an insult ; and to infer dishonour from his conduct would, of course, be unjust (*r*) ; but, generally speaking, an honest witness will be eager to rescue his character from suspicion, and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory (*s*).

§ 1080. We have before seen, while treating of evidence excluded from public policy (*t*), that there are certain other cases where witnesses cannot be *compelled*, and some where they will not be *allowed*, to answer questions put to them ; as, for instance, where they are interrogated with respect to privileged communications, secrets of state, and some other subjects. As these

(*o*) *R. v. Garbett*, decided M. T. 1847 ; pro, Parke, Alderson, Rolfe, Platt, B., Coltman, Maule, Wightman, Cresswell, Williams, Js. ; con. Lord Denman, Wilde, C. J., Pollock, C. B., Patteson, Coleridge, Erle, Js. This case overrules *Dixon v. Vale*, 1 C. & P. 278, per Best, C. J. ; and *East v. Chapman*, 2 C. & P. 573, per Abbott, C. J. ; M. & M. 47, S. C. ; and confirms *Ex parte Coassens*, re Worrall, Buck, 531, 545, per Lord Eldon.

(*p*) *Rose v. Blakemore*, Ry. & M. 383, per Abbott, C. J. ; *R. v. Watson*, 2 Stark. R. 158, per Holroyd, J. ; 32 How. St. Tr. 495, S. C. ; *Lloyd v. Passingham*, 16 Ves. 64, per Lord Eldon ; *Millman v. Tucker*, Pea. Add. Cas. 222, per Lord Ellenborough.

(*q*) See per Bayley, J., in *R. v. Watson*, 2 Stark. R. 153 ; 32 How. St. Tr. 491, S. C. ; Ry. & M. 384, 385, note.

(*r*) 2 Ph. Ev. 429.

(*s*) 1 St. Ev. 197.

(*t*) Ante, §§ 659—691.

matters have been already discussed, it is unnecessary to make any further reference to them in the present chapter.

§ 1081. Before leaving the subject of cross-examination, it will be right to allude to the effect on the trial, which would be produced by the death or sickness of the witness between his examination in chief and his cross-examination. This subject was much canvassed in Ireland a few years back, in the case of *R. v. Doolin* (t), where a witness for the Crown having been suddenly taken ill on cross-examination, the question was, whether the conviction of the prisoner upon his testimony was legal. The twelve judges were almost equally divided in opinion, but the majority held that the conviction was good; and they drew an analogy between this case, where the testimony had been stopped by the act of God, and that of dying declarations, or of depositions before coroners where the witness had died before the trial.

§ 1082. After a witness has been examined in chief, his *credit may be impeached*, not only by means of cross-examination, but in various other modes. First, witnesses may be called to *disprove* such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue (u). Next, evidence may be adduced reflecting on his *character for veracity*. But here the evidence must be confined to his *general reputation*, and will not be permitted as to *particular facts*; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared, without notice, to answer the other (x). Besides, the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule (y). The regular mode of examining into the character of the person in question, is to ask the witness whether he knows his general reputation among his neighbours,—what that reputation is,—and whether, from such knowledge, he would believe him upon his oath (z). The propriety

(t) 1 Jebb, C. C. 123.

(u) As to what are material, see ante, §§ 237, et seq., 1065—1067.

(x) B. N. P. 296, 297; *R. v. Rookwood*, 13 How. St. Tr. 210, per Sir Thomas Trevor, Att.-Gen., argu.; *R. v. Layer*, 16 How. St. Tr. 285, per Pratt, C. J.

(y) *R. v. Rookwood*, 13 How. St. Tr. 211, per Lord Holt.

(z) *R. v. Watson*, 32 How. St. Tr. 495, 496; *R. v. De la Motte*, 21 How. St.

of this last question, although sustained by no inconsiderable weight of authority both in England and in the United States (*a*), has of late been questioned in the American Courts; and it seems that, in those courts at least, a witness will not now be permitted to state his own opinion that another witness is not worthy of belief (*b*).

§ 1083. Whether the inquiry into the general character of a witness shall be restricted to his reputation for veracity, or may be made in general terms, *involving his entire moral character* and estimation in society, is a point not yet definitely settled. Still, when we consider how intimate is the connection between one crime and another, and moreover, how difficult it may be to find a witness, who can, in strictness, testify as to the character of another for veracity, though that other may, in the language of Sir Charles Wetherell, have been notoriously "guilty of crimes under every letter of the alphabet" (*c*), and be consequently

Tr. 811, per Buller, J.; *Mawson v. Hartsink*, 4 Esp. 103, 104, per Lord Ellenborough; *The People v. Mather*, 4 Wend. 257, 258; *The State v. Boswell*, 2 Dev. R. 209, 211; *Anon.*, 1 Hill, S. Car. R. 258.

(*a*) Cases cited in last note.

(*b*) *Gass v. Stinson*, 2 Sumn. 610, per Story, J.; *Kimmel v. Kimmel*, 3 Serg. & R. 336—338; *Wike v. Lightner*, 11 Serg. & R. 198; *Swift's Ev.* 143; *Phillips v. Kingfield*, 1 Appleton's R. 375. In this last case the subject was ably examined by Shepley, J., who observed:—"The opinions of a witness are not legal testimony except in special cases; such, for example, as experts in some profession or art, those of the witnesses to a will, and in our practice, opinions on the value of property. In other cases, the witness is not to substitute his opinion for that of the jury; nor are they to rely on any such opinion instead of exercising their own judgment, taking into consideration the whole testimony. To permit the opinion of a witness, that another witness should not be believed, to be received and acted on by a jury, is to allow the prejudices, passions, and feelings of that witness to form, in part at least, the elements of their judgment. To authorise the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it. It moreover would permit the introduction and indulgence in courts of justice of personal and party hostilities, and of every unworthy motive by which man can be actuated, to form the basis of an opinion to be expressed to a jury to influence their decision," 1 Applet. R. 379. But, *quære*, whether a witness to impeach reputation may not be asked, in cross-examination, if he would not believe the principal witness on oath. (*c*) *R. v. Watson*, 32 How. St. Tr. 458.

undeserving of the slightest credit,—it certainly appears reasonable that the question as to reputation should be put in the most general form, the opposite party being at liberty to inquire whether, notwithstanding the bad character of the witness in other respects, he has not preserved his reputation for truth. Indeed, there are one or two English authorities which seem to sanction this course (*d*); and although a stricter rule is said to prevail in some of the United States, yet in others, as for instance, in North and South Carolina, and in Kentucky, the general range of inquiry for which we contend, is distinctly allowed (*e*). It is not, however, enough that the impeaching witness should profess merely to state what he has heard “others” say; for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is

(*d*) *R. v. Rookwood*, 13 How. St. Tr. 211; *Carpenter v. Wall*, 11 A. & E. 803; Lord Stafford's case, 7 How. St. Tr. 1459, 1478; *Sharp v. Scoging*, Holt's N. P. R. 541, per Gibbs, C. J.

(*e*) *Anon.*, 1 Hill, 251, 258, 259; *The State v. Boswell*, 2 Dev. Law R. 209, 210; *Hume v. Scott*, 3 J. A. K. Marsh. 261, 262. In this last case, Mills, J., makes the following observations: “Every person, conversant with human nature, must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that, to ascertain the existence of one vice of a particular character, is frequently to prove the existence of more at the same time, in the same individual. Add to this, that persons of infamous character may, and do frequently exist, who have formed no character as to their lack of truth; and society may have never had the opportunity of ascertaining, that they are false in their words or oaths. At the same time they may be so notoriously guilty of acting falsehood, in frauds, forgeries, and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than practise those other vices. In such cases, and with such characters, ought the jury to be precluded from drawing inferences unfavourable to their truth as witnesses, by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held in the society or neighbourhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinise his statements more strictly; while in cases of vile reputation in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book as to fix upon him the reputation of a liar, when on oath.”

chiefly conversant ; for it is this only which constitutes his general reputation (*f*). And, in ordinary cases, the witness should himself come from the neighbourhood of the individual, whose character is in question; for if he be a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries (*g*).

§ 1084. Where the general reputation of a witness has been thus impeached, the party calling him may *re-establish his credit*, by cross-examining the witnesses, who have spoken against him, as to their means of knowledge and the grounds of their opinion (*h*), or as to their own character and conduct, or by calling other witnesses, either to support the character of the first witness, or to attack in their turn the general reputation of the impeaching witnesses (*i*). How far this plan of recrimination may be carried at common law, is not yet determined ; though in courts of equity the practice is in conformity with the doggerel rule of the civil law,

In testem testes, et in hos, sed non datur ultra ;

that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses can be called to attack the characters of the last (*k*).

§ 1085. The credit of a witness may also be impeached, by proof that he has made *statements out of court contrary to what he has testified at the trial*. But it is only in such matters as are *relevant* to the issue, that the witness can be contradicted. And before this can be done, it is generally held necessary, in the case of verbal statements, *first to ask him* as to the *time, place, and person involved in the supposed contradiction*. It is not enough to ask him the general question, whether he has ever said so-and-so, because it may frequently happen that, upon the general question, he may not remember having used the language imputed

(*f*) *Boynton v. Kellogg*, 3 Mass. 192, per Parsons, C. J. ; *Wike v. Lightner*, 11 Serg. & R. 198—200 ; *Kimmel v. Kimmel*, 3 Serg. & R. 337, 338.

(*g*) *Mawson v. Hartsink*, 4 Esp. 103, per Lord Ellenborough ; *Douglass v. Tousey*, 2 Wend. 352.

(*h*) *Mawson v. Hartsink*, 4 Esp. 103, 104.

(*i*) 2 Ph. Ev. 432.

(*k*) *Lord Stafford's trial*, 7 How. St. Tr. 1484.

to him ; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said (*l*). This course of proceeding is considered indispensable from a sense of justice to the witness ; for, as the

(*l*) *Angus v. Smith*, M. & M. 473, per Tindal, C. J. ; *Crowley v. Page*, 7 C. & P. 789, per Parke, B. ; *Andrews v. Askey*, 8 C. & P. 7, per Tindal, C. J. ; *Magrath v. Browne*, Arm. Mac. & Ogle, 133. In the Queen's case, this subject was very much discussed, and the unanimous opinion of the learned Judges was delivered by Abbott, C. J., in these terms : " The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the Courts below, and a practice, to which we are not aware of any exception, is this ; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary ; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish ; and thus the whole matter is brought before the Court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declaration imputed to him, the adverse party has an opportunity afterwards of contending, that the matter of the speech or declaration is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it ; and, if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot be compelled to answer, the adverse party has, in this instance also, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question, affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to ; and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but, because, if not given in the first instance, it may be wholly lost ; for a witness, who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done ; and, in our opinion, not unfrequently would be done both to the witness and to the party ; and this, not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant ; and one of the great objects of the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein." 2 B. & B. 313, 314. In America the same course is understood to be generally adopted ; except in *Maine, Ware v. Ware*, 8 Greenl. 42 ; and perhaps in *Massachusetts, Tucker v. Welch*, 17 Mass. 160 ; Sed vide *Brown v. Bellows*, 4 Pick. 188.

direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity of recollecting the facts, and, if necessary, of correcting the evidence he has already given, as well as of explaining the nature, meaning, and design of what he is alleged elsewhere to have said (*m*). And this rule is extended, not only to contradictory statements by the witness, but to other declarations, and to acts done by him through the medium of verbal communications, which are offered with the view either to contradict his testimony in chief, or to prove him a corrupt witness himself, or to have been guilty of attempting to corrupt others (*n*). "I like the broad rule," said Mr. Justice Patteson on one occasion, "that where you mean to give evidence of a witness's declarations *for any purpose*, you should ask him whether he ever used such expressions" (*o*). The case which called forth these observations was an action for seduction, and the Court seem to have considered, though the point was not decided, that for the purpose of reducing the damages, the defendant, without first cross-examining the principal female witness, might call persons to specify particular language of an indecent and unbecoming character as used by her; but it is humbly submitted that, in strictness, this course could not be pursued, but that the defendant, in such a case, should be restricted to general evidence of lightness of conduct.

§ 1086. It matters not in the application of this rule, whether the fact that the witness has made the statements alleged be or be not known before his cross-examination is closed; for the only effect of a subsequent discovery will be, that the Court in such case will allow the witness to be called back for further cross-examination if still within reach; but if the witness cannot be found, the proof of the statements must be rejected (*p*). It seems also, though the authorities are not uniform on the

(*m*) 2 Ph. Ev. 433.

(*n*) The Queen's case, 2 B. & B. 311. See ante, § 1066.

(*o*) Carpenter v. Wall, 11 A. & E. 804. As to the mode of examining witnesses in criminal cases, respecting statements made by them before the magistrates or the coroner, see ante, §§ 1058, 1059.

(*p*) The Queen's case, 2 B. & B. 312, 313.

subject (*q*), that the witness, on cross-examination, need not have positively denied the language imputed to him; for if he has stated that he does not *recollect* having used the words, the fact that he has done so may be proved by another witness, provided it be relevant to the issue. If this were not the law, a witness might always protect himself against contradiction, by alleging that he did not remember.

§ 1087. After a witness has been cross-examined, the party who called him has a *right to re-examine* him, and to ask all questions which may be proper to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, or provocation, which induced the witness to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness (*r*). This point, after having been much discussed in the Queen's case, was brought before the Court several years afterwards, when the learned judges held it to be settled law, that proof, on cross-examination, of a detached statement, made by or to a witness at a former time, does not authorise proof by the party calling that witness, of all that was said at the same time, but only of so much as can be in some way connected with the statement proved (*s*). Therefore, where a witness had been cross-examined as to what the plaintiff said in a particular conversation, it was held that he could not be re-examined as to other assertions made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related, although the assertions as to which it was proposed to re-examine him, were connected with the subject-matter of the suit (*t*). But if a witness admits on cross-examination,

(*q*) *Crowley v. Page*, 7 C. & P. 789, per Parke, B., in support of the rule as stated in the text. *Pain v. Beeston*, 1 M. & Rob. 20, per Tindal, C. J., and Long v. Hitchcock, 9 C. & P. 619, per Lord Abinger, *contra*.

(*r*) Such was the opinion of seven out of eight judges in the Queen's case, as delivered by Lord Tenterden, 2 B. & B. 297; *R. v. St. George*, 9 C. & P. 488, per Parke, B.

(*s*) *Prince v. Samo*, 7 A. & E. 627; 3 Nev. & P. 139, S. C.; recognised in *Sturge v. Buchanan*, 10 A. & E. 605.

(*t*) *Prince v. Samo*, 7 A. & E. 627. In this case, the opinion of Lord Tenterden,

that he has formerly made statements inconsistent with his present testimony, or if that fact be proved by independent evidence, the witness may be asked, on re-examination, to explain his motives for making such inconsistent statements (*u*).

§ 1088. If the counsel chooses to cross-examine the witness to *facts, which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given. Thus, where issue was joined upon a plea of prescription to a declaration for trespass in G., and the plaintiff's witnesses were asked, in cross-examination, questions respecting the user in other places than G., which they proved; it was held that the plaintiff, in re-examination, might show an interruption in the user in such other places (*v*). But an adverse witness will not be permitted to obtrude such irrelevant matter in answer to a question not relating to it; and if he should do so, the party cross-examining may apply to have the answer struck out of the judge's notes, after which the witness cannot be re-examined on the subject (*x*). If, however, the cross-examining counsel omit to take this course, the re-examination will be allowed (*y*).

§ 1089. Where evidence of contradictory statements, or of other improper conduct on the part of a witness, has been either elicited from him on cross-examination, or obtained from other witnesses, with the view of impeaching his veracity,—his *general character* for truth being thus, in some sort, *put in issue*,—it has been deemed reasonable to admit general evidence, that he is a man of strict integrity and scrupulous regard for truth (*z*). But evidence that he has on other occasions made statements, similar to what he has testified in the cause, is not admissible (*a*); unless where a design

in the Queen's case, 2 B. & B. 298, that evidence of the whole conversation, if connected with the suit, was admissible, though it related to matters not touched in the cross-examination, was considered, and overruled.

(*u*) R. v. Woods, 1 Crawl. & Dix, Cir. R. 439, per Burton, J.

(*v*) Blewett v. Tregonning, 3 A. & E. 554; 5 N. & M. 308, S. C.

(*x*) Id. 3 A. & E. 554, 565, 581, 584.

(*y*) Id.

(*z*) R. v. Clarke, 2 Stark. R. 241; Annesley v. Anglesea, 17 How. St. Tr. 1348.

(*a*) B. N. P. 294; R. v. Parker, 3 Doug. 242, 244, per Buller, J.; Anon., per Eyre, C. J., cited 2 Ph. Ev. 445; Berkeley Peerage, per Lord Redesdale, cited id. These cases overrule Lutterell v. Reynell, 1 Mod. 283.

to misrepresent is charged upon the witness, in consequence of his relation to the party, or to the cause; in which case it may be proper to show, that he has made a similar statement before that relation existed (*b*). So, if the character of a deceased attesting witness to a deed or will is impeached on the ground of fraud, evidence of his general good character is admissible (*c*). But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to their character (*d*); though if fraud, or other improper conduct, be imputed to any of them, such evidence will then be received (*e*).

§ 1090. It remains only to be observed, that the judge has always a discretionary power of *recalling witnesses* at any stage of the trial, and of putting such legal questions to them as the exigencies of justice require (*f*). He will seldom, however, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact (*g*); though the application will in general be entertained, if made before the closing of the plaintiff's case (*h*). So, if a question has been omitted in the examination in chief, and cannot, in strictness, be asked on re-examination as not arising out of the cross-examination, it is usual for the counsel to request the judge to make the inquiry; and such a request is generally granted (*i*). In former times, when the evidence of witnesses called on opposite sides was directly conflicting, the Court would often direct that the witnesses should be *confronted*; and on one remarkable occasion, no less than four witnesses were for this purpose placed

(*b*) 2 Ph. Ev. 446; 2 Poth. on Obl. by Evans, 251.

(*c*) Doe v. Stephenson, 3 Esp. 284; 4 Esp. 50, S. C., cited and approved by Lord Ellenborough in The Bishop of Durham v. Beaumont, 1 Camp. 207—210, and in Provis v. Reed, 5 Bing. 435; 3 M. & P. 4, S. C.; Doe v. Wood, cited by Burrough, J., 5 Bing. 439.

(*d*) Bishop of Durham v. Beaumont, 1 Camp. 207.

(*e*) Annesley v. Anglesea, 17 How. St. Tr. 1348.

(*f*) R. v. Watson, 6 C. & P. 653.

(*g*) Murray v. Sheriffs of Dublin, 1 Arm. Mac. & Og. 130, per Brady, C. B.; Johnston v. Clinton, id. 123, per id.; Kelly v. Smith, id. 150, per Crampton, J.; Bell v. Stewart, id. 401, per Brady, C. B.

(*h*) White v. Smith, 1 Arm. Mac. & Og. 171, per Brady, C. B.; Casson v. O'Brien, id. 263, per Pennefather, C. J.

(*i*) 2 Ph. Ev. 408.

together in the box (*k*). This practice has, of late, grown into disuse, and we lament that it has; since it certainly affords an excellent opportunity of contrasting the demeanour of the opposing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth (*l*).

(*k*) *Annesley v. Anglesea*, 17 How. St. Tr. 1350.

(*l*) Mr. Justice Cowen, in his note to Ph. Ev. vol. ii. p. 774, illustrates the utility of this practice by a case, "in which a highly respectable witness, sought to be impeached through an out-of-door conversation, by another witness, who seemed very willing to bring him into a contradiction, upon both being placed upon the stand, furnished such a distinction to the latter as corrected his memory, and led him in half a minute to acknowledge that he was wrong. The difference lay only in one word. The first witness had now sworn, that he did not rely on a certain firm as being in good credit. It turned out that, in his former conversation he spoke of a partnership, from which one name was soon afterwards withdrawn, leaving him now to speak of the latter firm thus weakened by the withdrawal. In regard to the credit of the first firm, he had, in truth, been fully informed by letters. With respect to the last, he had no information. The sound in the title of the two firms was so nearly alike, that the ear would easily confound them; and had it not been for the colloquium thus brought on, an apparent contradiction would doubtless have been kept on foot, for various purposes, through a long trial. It involved an inquiry into a credit, which had been given to another on the fraudulent representations of the defendant."

CHAPTER IV.

OF PUBLIC DOCUMENTS.

§ 1091. WRITINGS are divisible into two classes, namely, PUBLIC and PRIVATE. The former consists of the acts of public functionaries, in the *Executive, Legislative, and Judicial* Departments of Government; including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To the same class may be referred foreign acts of State, and the judgments of foreign courts. In the present chapter it is proposed to treat of all such public documents; and our inquiries will be directed, *first*, to the MEANS OF OBTAINING AN INSPECTION OR COPY of them; *secondly*, to the METHOD OF PROVING them; and, *thirdly*, to their ADMISSIBILITY AND EFFECT.

§ 1092. In former times it seems to have been considered necessary to obtain the sanction of the Attorney-General, in order to entitle any private person to inspect, or take copies of, the *general records of the realm* (a). At the commencement, however, of the present reign a better system was established, and most of these invaluable documents were placed under the charge and superintendence of the Master of the Rolls. The statute (b) by which this alteration was effected, contains no section directly entitling the public to inspect these documents, or declaring whether they have any, or what remedy, in the event of their being refused access to them; but it states in the preamble, that "it is expedient to establish one record office and a better custody, and to allow the free use of any public records, as far as stands with their safety and integrity, and with the public policy of the

(a) *Legatt v. Tollervey*, 14 East, 306, per Lord Ellenborough; *Doe v. Date*, 3 Q. B. 619, per Williams, J.

(b) 1 & 2 Vict. c. 94.

realm." It then empowers the Master of the Rolls to make rules "for the admission of such persons as ought to be admitted to the use of such records," and "to fix the amount of fees, if any," to be paid for such use (c); and proceeds to authorise either his Honour, or the Deputy-Keeper of the records, to allow copies to be made of any of the documents "at the request and cost of any person desirous of procuring the same" (d). In exercise of the powers here vested in him, Lord Langdale has directed, that all the public record offices shall be open daily from ten till four, excepting on Sundays and a few holydays (e),—has prescribed a very moderate scale of fees (f),—and has instructed the assistant-

(c) 1 & 2 Vict. c. 94, § 9.

(d) § 12.

(e) 2nd Rep. of Deputy-Keeper of Public Rec. i. Append. p. 14. The holydays are 24th May, her Majesty's birthday; 28th June, her Majesty's coronation; Good-Friday and Saturday following; Easter Monday and Tuesday; Whit-Monday and Tuesday; and Christmas-day to New-Year's-day, inclusive. Another rule allows a party, upon the inspection of a record, to take notes, extracts, or copies therefrom, in pencil, as he may think fit.

(f) Id. p. 15, the table of fees is as follows:—

	£	s.	d.
For a general search in all the calendars or indexes of each office	0	1	0
For inspection of records, the fee to cover all the use which may be made of the Record for the current week:—			
Each separate Roll of Chancery, or other roll of consecutive enrolments, excepting the specification rolls at the Rolls Chapel	0	1	0
The Rolls, files, or bundles of proceedings of Courts of Common Law, each year, i. e., the records of the four terms to be covered by the fee	0	1	0
Rolls of Ministers' and Receivers' accounts, court rolls, surveys, extents, terriers, deeds, and miscellaneous documents, classed topographically under one head, whether of parish, town, vill, manor, lordship, borough, city, deanery, archdeaconry, or diocese, each set or series	0	5	0
Single records of the last mentioned description	0	1	0
Specifications at the Rolls Chapel, each, and which is to include the fee for search	0	1	0
Post-mortem inquisitions, and other inquisitions upon the file, returns to Commissions, Pedes, chirographs, and concords of fines	0	1	0
General inspection of the last mentioned documents as to any family or place	0	5	0
Rolls of Parliament, or other parliamentary proceedings, each Parliament	0	1	0
Proceedings in Courts of Equity, each suit	0	1	0
Every bound book, portfolio, or volume, without reference to the nature or number of the documents which it may contain	0	1	0

keepers to give to *all applicants* every information and assistance in their power, not merely from the calendars and indexes, but also from their own knowledge of records (*g*). Indeed, his Honour has taken a truly enlightened view of the privileges of the public as connected with these documents; for, in a letter which he wrote to the Premier shortly after the passing of the Act, we find him thus expressing himself: "The Records have justly been called the *Muniments of the Kingdom and the People's Evidences*; and they ought to be kept and managed under such arrangements, as may afford to the public the greatest facility of using them that is consistent with their safety. The public ought to have access to them for the purpose of easily obtaining information upon the subjects to which the records relate, and ought to be enabled easily to obtain authentic copies of all documents, which can be adduced as evidence in the establishment or defence of rights, which are at issue in the course of judicial or Parliamentary proceedings" (*h*).

	£	s.	d.
All other documents not before enumerated, each	0	1	0
[If the number <i>bond fide</i> required for prosecuting any search relating to any family, place, or single object of inquiry, shall exceed five, then it shall be in the discretion of the assistant-keeper to remit the fees for all above that number. ¹]			
For copies of records :—			
Under three folios of 90 words	0	1	6
Above three folios, per folio	0	0	6
[The fee for inspection of a record to be deducted, if a copy be taken from the record produced.]			
For examination and authentication :—			
Under three folios, if required	0	1	6
Above three folios, per folio, if required	0	0	6
For enrolment of any specification, per folio	0	0	6
For annexing drawings or maps to any enrolment or specification	0	1	0
For attendance, at the bar of the House of Lords, or elsewhere, for the purpose of producing records, including the production thereof, or for giving evidence upon the records, per diem	2	2	0
Attending the Master of the Rolls upon a vacation	0	5	0
(<i>g</i>) 2nd Rep. of Deputy-Keeper of Public Rec. i. Append. p. 15.			
(<i>h</i>) Dated 7th Jan. 1839, and cited 1st Rep. of Deputy Keeper of Pub. Rec. App. 67.			

¹ This direction always receives the most liberal construction, particularly with respect to those cases in which the search is attended with difficulty.

§ 1093. We cite this passage the more readily, as showing that for the present at least, there is little chance of the question being mooted, whether or not the *public have a strict legal right to inspect these records*; but we imagine that, were it necessary to determine that question, it would be difficult to establish the affirmative, *except* as to such of the documents as are the *records* of the *superior courts* of law or equity; and even with respect to these, it may be doubtful whether the Queen's Bench would interfere by mandamus, unless the applicant was prepared to show that he was interested in the document which he sought to inspect (i). Indeed, it may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that, if the disclosure of their contents would, in the opinion of the Court, or of the chief executive magistrate, or of the head of the department under whose control they may be kept, be *injurious to the public interests*, an inspection would not be granted (k).

§ 1094. We have seen that one of the objects contemplated by the legislature in passing the Act of 1 & 2 Vict. c. 94, was the establishment of a *general Record Office*, in lieu of the many repositories which previously existed. Difficulties, however, have occurred in the selection of a site for the new building, and no final arrangements have hitherto been made with reference to this desirable object (l). At present, therefore, the records are lodged in the Stone Tower annexed to Westminster Hall; in the Chapter House at Westminster; in the Rolls House and Chapel, and adjoining offices; in the Carlton Ride, and in the Tower of London. The last two repositories contain the greatest bulk of the papers.

§ 1095. Among the records now under the custody of the Master of the Rolls, may be *enumerated* the following:—All the records of the superior courts of common law or equity, which are more than *twenty* years old; the records late in the custody of the Queen's Remembrancer, including those of the abolished offices of the Pipe, the Lord Treasurer's Remembrancer, the foreign

(i) See *R. v. Staffordshire Js.*, 6 A. & E. 99, 100, per Lord Denman.

(k) *Ante*, §§ 683, 689.

(l) The Commissioners for improving the metropolis have very recently reported in favour of the Rolls Estate. See their 6th Rep., dated 15th July, 1847.

Apposer, the Clerk of the Estreats, the Surveyor of Green Wax, and the Clerk of the Nichils; the records of the Augmentation Office, the King's Silver Office, the Alienation Office, and the Chirographer's Office; records of the Admiralty Courts; the Log-books of the Navy; various branches of the correspondence and documents of the Admiralty and Navy Boards; the Charity Commission papers; various records of forfeited estates; the French Claim Commission papers; duplicates of land and assessed taxes; Population Returns; some records relating to the land revenue (*l*); many of the equity records of the Welch courts; the fines and recoveries, and other records of the Chester circuit; the records of the Court of Wards and Liveries; some of the proceedings in the Star Chamber and the Court of Chivalry; the Pell records; the records of first fruits and tenths; Domesday Book; Parliament rolls; statute rolls; patent rolls; close rolls; some of the surveys of lands which formerly belonged to the Crown; Lieger-books and Chartularies of the dissolved monasteries, priories, &c.; and some very valuable Treasury papers (*m*). The legal reader will observe that very many of the documents here alluded to are not strictly records; but this circumstance is rendered immaterial by the Act of 1 & 2 Vict. c. 94, which provides that the word "records" in that Act shall be taken to mean all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature, belonging to her Majesty, or, on the 14th of August, 1838, deposited in any of the offices or places of custody in the Act mentioned (*n*).

(*l*) As to the remainder, see post, § 1096.

(*m*) This list is compiled from the annual reports of the Deputy Keeper of the public records, and from an unpublished work of Mr. F. S. Thomas, which is entitled, "Notes of Materials for the History of Public Departments." It is not offered as anything like a complete list, though the author hopes that it may prove of some service to his readers, until a general index of the records, upon which Mr. Thomas is now employed, shall be published. The accuracy of the list, so far as it goes, can be relied on, as Sir Francis Palgrave has kindly corrected the proof sheets. Besides the documents enumerated above, there are, at the Record Office, a vast quantity of curious miscellaneous manuscripts, minute books, indices, calendars, &c., which were either collected by the late record commissioners, or by persons employed in the Record Office, together with many important transcripts from the royal or public archives of France, Normandy, Belgium, Saxony, Prussia, Bavaria, Hamburg, Portugal, Switzerland, and Italy. But all these are merely deposited for convenience with the Master of the Rolls, and are not in official custody under the Act.

(*n*) See §§ 20, and 1 & 2.

§ 1096. In addition to the records, which are now placed under the control of the Master of the Rolls, there are many *other documents of a public character*, the *custody* of which belongs to *particular courts and offices*. Among these may be enumerated the records of the Duchy of Lancaster, which are at present deposited in Lancaster-place, adjoining Waterloo-bridge; the records of the Marshalsea and Palace Courts, which are kept at the Court-house in Great Scotland-yard; the records of the State Paper Office, the repository for which is in Duke-street, St. James'-park; most of the land revenue records, which parties interested may inspect at the "Office of land revenue records and inrolments" in Spring Gardens (*o*); and the original wills, for which probate has been granted by the Prerogative Court of Canterbury, and which, in practice, are so far regarded as public documents that any one is allowed to search them at No. 6, Great Knight Rider-street, Doctors' Commons, and to obtain copies of them, on payment of a trifling fee. We may also here mention the records of baptisms, marriages, and burials in India (*p*), which are deposited at the East India House; and the registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere, and are now placed in the registry of the Consistory Court of London (*q*).

(*o*) See 2 Will. 4, c. 1, §§ 15, 20, 22. Some of these records are at the Carlton Ride, ante, § 1095. The audited accounts of the Commissioners of Woods and Forests are now deposited as of record in the Land Revenue Office, 7 & 8 Vict. c. 89.

(*p*) In Bengal, from 1713 to 1837; at Madras, from 1698 to 1834; in Bombay, from 1709 to 1837; and at St. Helena, from 1767 to 1835. See p. 13 of Rep. of Comms., appointed to make inquiries respecting non-parochial registers, published 1838.

(*q*) "These registers were first received in the registry of the Consistorial Court of London, in 1816, and may be divided into three classes:—1. Certificates of baptisms and marriages, bearing the signatures of the parties and witnesses, (which, with very few exceptions, is the case,) and authenticated by the British envoy or minister, as having been performed in his house, and which have from time to time been sent through the Foreign Office to the registry of the Bishop of London. In this class may be included the registers from Oporto from 1706 to 1802, and the registers from the Cape of Good Hope, Gibraltar, and Geneva. These are original books, in which the entries are signed by the parties, and authenticated by the chaplains. 2. Transcripts from original registers, certified by the ministers of the different places, in the same manner as the transcripts under the Act of 52 Geo. 3, c. 146, for the regulation of transcripts deposited with

§ 1097. With respect to the *records of the Queen's Courts*, it has been admitted, from a very early period, that the *inspection* and *exemplification* of these documents are the *common right of the public*; and this right was extended by an ancient ordinance or statute (*r*), to cases where the subject was concerned against the Crown. It should be observed with regard to this Act, and to the common law on which it is in part founded, that they simply relate to such records as are required by the subject for the purpose of being given in evidence; and that, consequently, *they* do not entitle a prisoner, who is charged either with high treason or felony, to a copy of the indictment or of any of the proceedings against him (*s*). In most cases of treason, indeed, the accused must now be supplied, ten clear days before his trial, with a copy of the indictment, but this privilege is allowed him in consequence of statutes having been passed for that purpose in the reigns of King William III. (*t*) and Queen Anne (*u*). Still, in ordinary cases of felony, including that class of treasons, which consists in

the registrars of the several dioceses. A book of transcripts also from the register kept at the British embassy in Paris, from 1816 to 1833, and continued to the present time; and a transcript of the registers of St. Petersburg, from 1706 to the present time. 3. A book of registers, transmitted from Cronstadt, which appear to have been transcribed, but they are not certified as such."—p. 11 of Rep. of Comms., cited in last note.

(*r*) 46 Edw. 3. which is in these words:—"Item p'rie la commune qe come recordes et qeconqe chose en la Court le Roi de reson devoient demurer illoeqes pur *perpetuel evidence* de touz parties a ycely et de touz ceux a queux en nul manere ils atteignent quant mestier lour fuist, et ja de novel refusent en la Court nostre dit Seignur de serche ou exemplification faire des nulles riens qe purrachier en evidence encontre le Roi ou desavantage de ly, qe pleire ordeiner per estatut qe *serche et exemplification* soient faitz as touz gentz de *qeconqe records qe les touche en aucun manere ausibien de ce qe chiet encontre le Roi come autres gentz*. R. *Le Roi le voet*." This enactment is not printed in its order in the statute book, perhaps, because it was not made till after the dismission of the Knights of the Shire. It is, however, cited as an Act by Lord Coke, 3 Rep. p. iv., and was so considered by the Court on the trials of Algernon Sydney and Lord Preston. See 9 How. St. Tr. p. 837, and 12 id. 658—663. It is now printed in the Appendix to 9th Vol. of the Stat. at large, p. 45, quarto ed.

(*s*) R. v. Lord Preston, 12 How. St. Tr. 658—663; Foster Cr. Law, 228, 229.

(*t*) 7 Will. 3, c. 3, § 1.

(*u*) 7 Anne, c. 21, § 11, which enacts, that copies of all indictments for high treason and misprision of treason, "shall be delivered to the party indicted ten days before the trial, and in presence of two or more credible witnesses." See also 5 Geo. 3, c. 21, § 1, 1r.

compassing the death or personal injury of the Sovereign (*x*), the *accused is not*, even at the present day, *'entitled to a copy of the indictment'*; but all that he can claim as of right is, to have it read slowly to him in open court (*y*). This rule, which is the very essence of injustice (*z*), fortunately does not *extend to misdemeanors*; the common law, with an inconsistency which admits of no sensible explanation, having vouchsafed to parties liable to fine and imprisonment a privilege, which it refuses to persons on trial for their lives (*a*). With respect to the proceedings against a prisoner, that is, the depositions upon which he has been committed or held to bail, he is now entitled by statute, not only to inspect them at the trial, but also to obtain copies of them on payment of a small sum, whatever be the nature of the offence imputed (*b*).

(*x*) See 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, § 2, Ir.; 5 & 6 Vict. c. 51, § 1. See also ante, § 696.

(*y*) *R. v. Parry*, 7 C. & P. 838, per Bolland, B.; *R. v. Vandercomb*, 2 Lea. C. C. 711, 719; *R. v. Cruise*, Ir. Cir. R. 674, per Torrens, J. Though this seems to be the present law in Ireland, it is a curious fact, that in 1641, the Irish judges unanimously resolved, that they had no power, by law, to refuse to give to the accused a copy of the indictment; and the Irish House of Commons, in the same year, declared, that judges ought not to deny copies of indictments to parties indicted. See an able note on this subject in 1 Ir. Cir. R. 375—378. See also *Bothe's case*, Sir Edw. Moore's Rep. 666.

(*z*) Mr. Chitty observes on this subject, "It is a remarkable circumstance, that the English law should allow so much nicety to prevail with respect to formal defects in the indictment, and yet afford the defendant so little opportunity of discovering them." 1 Chit. Crim. Law, 403. The flagrant absurdity of the one rule caused the as flagrant injustice of the other.

(*a*) *Lady Fulwood's case*, Cro. Car. 483; 1 Chit. Cr. Law, 404. The act of 60 Geo. 3 & 1 Geo. 4, c. 4, § 8, enacts, apparently, *pro majori cautela*, "that in all cases of prosecutions for misdemeanors, instituted by the Attorney or Solicitor-General, in the Courts [of King's Bench at Westminster or Dublin, or at any session of the peace, session of oyer and terminer, great session or session of gaol delivery in England or Ireland], the Court shall, if required, make order that a copy of the information or indictment shall be delivered after appearance to the party prosecuted, or his clerk in court or attorney, upon application made for the same, free from all expense to the party so applying; provided that such party, or his clerk in court or attorney, shall not have previously received a copy thereof." See also 7 & 8 Geo. 4, c. 53, § 42.

(*b*) 6 & 7 Will. 4, c. 114, § 3, enacts that "all persons who shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have, on demand, (from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same,) copies of the examinations of the

§ 1098. It has been doubted whether a person *tried for felony and acquitted* is entitled to a copy of the record of his acquittal, for the purpose of giving it in evidence in an action for *malicious prosecution* (c). This doubt has arisen in consequence of an order made by five judges in the reign of Charles II., for the regulation of the Sessions at the Old Bailey; and which directs, "that no copies of any indictment for felony be given without special order upon motion made in open court, at the general gaol delivery upon motion (d); for the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the King upon just occasions" (e). Now, it is certainly difficult, if not impossible, to establish the legality of this order; for, not only does it appear to be directly at variance with the Act of 46 Edward III. (f), but it seems also to be wholly inconsistent with the provisions of Magna Charta, "*nulli negabimus vel differemus justitiam.*" Accordingly, in the case of a prosecution for robbery, evidently vexatious, where the prisoner after his acquittal applied to Chief Justice Willes for a copy of the indictment, his Lordship refused to make an order on the subject, on the ground that none was necessary; declaring,

witnesses respectively, upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words: provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person, on whose behalf such demand shall be made, is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged." § 4 enacts, "that all persons under trial shall be entitled, at the time of their trial, to inspect without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

(c) *Browne v. Cumming*, 10 B. & C. 70. See *R. v. Dunne*, Ir. Cir. R. 407, where a prisoner having been convicted, the Court refused to allow him a copy of the depositions of a crown witness, for the purpose of assigning perjury upon them.

(d) *Sic*.

(e) 7th Res., cited in *Kelyng*, 3. The five judges were Hyde, C. J., Orlando Bridgman, C. J., Twisden, Tyril, and *Kelyng*, J.

(f) *Ante*, § 1097, n. (r).

that, by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out" (*f*). We have no hesitation in pronouncing an opinion that this statement of the law is substantially correct, and that the order of the judges, confirmed though it be by a decision of Lord Holt's (*g*), is illegal; but, be this as it may, thus much may be safely affirmed; first, that the order does not extend to misdemeanors, but that in such cases the prisoner has an absolute right to a copy of the indictment on which he has been either acquitted or convicted (*h*); secondly, that, even in cases of felony, where the party acquitted brings an action for malicious prosecution, the judge at Nisi Prius is bound to receive in evidence a true copy of the indictment, though proved to have been obtained without an order (*i*); and lastly, that, for the purpose of pleading either *autrefois acquit*, or *autrefois convict*, the prisoner is entitled to have a copy of the former record, whatever be the nature of the accusation; and if the Court where he was first tried refuses to grant him one, the Queen's Bench will enforce his right by *mandamus* (*k*).

§ 1099. It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction (*l*); but it is clear that every one has a *right to inspect and take copies* of the parts of the proceedings in which he is *individually interested*. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper

(*f*) *R. v. Brangan*, 1 Lea. C. C. 27. See also *Doe v. Date*, 3 Q. B. 619, per Williams, J.

(*g*) *Groenvelt v. Burrell*, 1 Lord Raym. 253; Carth. 421, S. C.

(*h*) *Morrison v. Kelly*, 1 W. Bl. 385, per Lord Mansfield; *Evans v. Phillips*, 2 Sel. N. P. 1072, per Adams, B.

(*i*) *Legatt v. Tollervey*, 14 East, 302; *Jordan v. Lewis*, id. 305, n.; 2 Str. 1122, S. C.

(*k*) *R. v. Middlesex Js.*, in re Bowman, 5 B. & Ad. 1113.

(*l*) *R. v. Chester*, 1 Chit. R. 297, 299, per Abbott, C. J., questioning *Herbert v. Ashburner*, 1 Wils. 297.

purpose (*m*). If his application be refused, the Court of Chancery or the Queen's Bench, upon affidavit of the fact, may send, by a writ of certiorari, either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction; and the magistrate having refused to give him one, they granted a writ of certiorari, for the mere purpose of procuring a copy, and of thus enabling the defendant to defeat the action (*n*). So, where a party, who had been sued in a court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself (*o*).

§ 1100. Indeed, it may be laid down as a general rule, that the Court of Queen's Bench will *enforce by mandamus the production of every document of a public nature*, in which any one of Her Majesty's subjects can prove himself to be *interested* (*p*). Every officer, therefore, appointed by law to keep records ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves,—without putting them to the expense and trouble of making a formal application for a mandamus (*q*). But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, or the Court will not interfere in his favour; and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced (*r*). Thus, the rate-payers of a county are not entitled

(*m*) See *R. v. Wilts and Berks Can. Co.*, 3 A. & E. 47; *R. v. Leicester Js.*, 4 B. & C. 892.

(*n*) *R. v. Midlam*, 3 Burr. 1720—1722.

(*o*) *Wilson v. Rogers*, 2 Str. 1242.

(*p*) *R. v. Staffordshire Js.*, 6 A. & E. 99, 100, per Lord Denman.

(*q*) *Id.*

(*r*) *Id.* 100, 101.

to inspect and copy the bills of charges of county officers, which, having been paid by the treasurer under orders of justices, have become items in his accounts,—and have been allowed by the sessions, and deposited by the clerk of the peace among the county records (*s*). For in such case the individual rate-payers would have no power to interfere, even though they might prove to demonstration, that the bills had been improperly paid and allowed.

§ 1101. There are other books and documents, which partake *both of a public and private character*, and are treated as the one or the other, according to the relation in which the applicant stands to them. Thus, a stranger has no right to an inspection of the *rolls of copyhold courts* and of courts baron (*t*); but the *copyhold* tenants of a manor are clearly entitled to inspect and take copies of such parts, though of such parts only (*u*), of the court rolls, as relate to their own titles, privileges, or interests; and this too, whether an action be pending or not (*x*). Indeed, by a general rule of court (*y*), it is determined, that “an order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection.” It has been held, that this last rule is not strictly confined to cases where the applicant is a copyhold tenant; but if he has a *primâ facie* title to a copyhold (*z*), or is otherwise interested in copyhold property (*a*), as, for instance, if he is the devisee of a rent-charge on such property (*b*), the Court will grant him a rule for a mandamus absolute in the first instance. Even a *freehold* tenant of a manor has a right to inspect the court rolls (*c*); though it may, perhaps,

(*s*) *R. v. Staffordshire Js.*, 6 A. & E. 84; overruling *R. v. Leicester Js.*, 4 B. & C. 891. See also *R. v. St. Marylebone*, 5 A. & E. 268.

(*t*) *Crew v. Saunders*, 2 Str. 1005; *R. v. Shelley*, 3 T. R. 142, per Buller, J.

(*u*) *R. v. Merchant Tailors' Co.* 2 B. & Ad. 128, 129, per Littledale, J.

(*x*) *R. v. Tower*, 4 M. & Sel. 162; *R. v. Lucas*, 10 East, 235.

(*y*) *Reg. Gen. H. T.* 2 Will. 4, § 102; 3 B. & Ad. 389.

(*z*) *R. v. Lucas*, 10 East, 235.

(*a*) *Ex parte Hutt*, 7 Dowl. 690, per Coleridge, J.

(*b*) *Ex parte Barnes*, 2 Dowl. N. S. 20, per Wightman, J.

(*c*) *Addington v. Clode*, 2 W. Bl. 1030; *Hobson v. Parker*, Barnes, 237, cited by Buller, J., in 3 T. R. 142.

be doubtful, whether he must not first show that some suit is actually depending (*d*).

§ 1102. Again, the *books of a corporation* are, at common law (*e*), regarded as public to a certain extent with respect to its members, but private with respect to strangers. Thus, on the application of a *member*, the Court of Queen's Bench will, in general, grant a rule for a limited inspection of the documents of the corporation (*f*), provided it be shown that such inspection is requisite with reference either to a suit then instituted, or at least to some specific dispute or question depending, in which the applicant is interested (*g*); but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion (*h*). The rule appears to have been sometimes laid down more broadly, and the language ascribed to the Court in one or two cases would almost lead to the inference, that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body (*i*). But this doctrine is now properly exploded; the privilege of inspection being confined to those cases in which the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object (*k*). For instance, where certain members of a corporation applied for a mandamus to the master and wardens to allow them to inspect all the documents of the corporation, alleging their belief that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute, the Court held that they had no right on these speculative grounds to the inspection prayed, and discharged the rule with costs (*l*). So, where some parties were sued by an incorporated company for alleged misconduct in making

(*d*) *R. v. Allgood*, 7 T. R. 746. But see *R. v. Lucas*, 10 East, 235, and *R. v. Tower*, 4 M. & Sel. 162.

(*e*) As to the Statute Law, see post, §§ 1110, 1111.

(*f*) *R. v. Beverley*, 8 Dowl. 140.

(*g*) *R. v. Merchant Tailors' Co.*, 2 B. & Ad. 115.

(*h*) *Id.*

(*i*) *R. v. Hostmen of Newcastle*, 2 Stra. 1223; *R. v. Babb*, 3 T. R. 581, per Ashhurst, J.

(*k*) *R. v. Merchant Tailors' Co.*, 2 B. & Ad. 115.

(*l*) *Id.*

false entries in the books of the corporation, while acting in the capacity of directors, the Court held that they were not entitled to a general inspection of the company's books, at least without an affidavit that such inspection was necessary for their defence (*m*). In another case, where a shareholder, sued for calls, applied to the Court for a rule to inspect the minute-books of the company and of the meetings of the directors, "particularly with respect to the calls" in question, the application was rejected, as it appeared to have been made for the purpose, not of assisting the defendant to plead a particular plea, but of enabling him to fish out a defence (*n*).

§ 1103. The right of inspection which the members of a corporation enjoy being thus limited, it is only just that this right should be still more restricted in the case of *persons who are not members*; and, accordingly, unless the documents sought to be inspected contain the common evidence of some transaction between the corporation and a stranger, or at least furnish the rule by which the stranger is sought to be bound, he has no right to inspect them, even though he be a defendant in a suit brought by the corporation. Thus, if a corporation were to bring an action against a stranger for tolls, the courts of common law could not grant the defendant leave to inspect the corporation muniments (*o*); neither, in such a case, would a court of equity interfere (*p*). But, if an action were brought against a party residing in a borough, for the breach of a bye-law restraining persons, not freemen, from exercising trades within the limits, the Court would compel the corporation to allow the defendant to inspect the bye-law, because it must be taken to have been made for the public weal, and for the rule and government of persons dwelling within the borough (*q*).

§ 1104. The rules just mentioned apply with equal force to

(*m*) *Imperial Gas Co. v. Clarke*, 7 Bing. 95.

(*n*) *Birmingham, Bristol, and Thames Junct. Rail. Co. v. White*, 1 Q. B. 282.

(*o*) *Mayor of Southampton v. Graves*, 8 T. R. 590; overruling *Mayor of Lynn v. Denton*, 1 T. R. 689, and *Barnstable v. Lathey*, 3 T. R. 303.

(*p*) *Bolton v. Corporation of Liverpool*, 3 Sim. 467; 1 Myl. & K. 88, S. C.; recognised in *Nias v. Northern and East. Rail. Co.*, 3 Myl. & Cr. 357.

(*q*) *Harrison v. Williams*, 3 B. & C. 162.

parish books. Thus, *parishioners* have a right to inspect them for ordinary parochial purposes, as, for instance, if a dispute be pending respecting the validity of a rate (*r*), or the like; but they are not, as it seems, entitled to have access to them for purposes unconnected with the affairs of the parish (*s*). Thus, access to parish books has been refused to a parishioner, who, being sued for a libel upon the vestry clerk, sought to inspect the books, for the purpose of enabling him to plead a justification (*t*). So, a parishioner has no right to inspect parish books, for the mere purpose of obtaining information to support his claim to an estate in the parish (*u*). Moreover, *strangers* have no right to an inspection at all; and so strictly has this rule been enforced, that where a party brought an action of trespass against parish-officers for entering his house to distrain for poor rates, and the defendants having averred in justification that the house was within the parish, the plaintiff took issue on this fact, the Court held that, at common law, he could not demand an inspection of the parish books, though the defendants alleged that he was a parishioner, for he himself denied the allegation (*v*). However, in this case, a bill of discovery having been filed, the Court of Chancery ordered the defendants to produce the rate-books and other parish documents, which related to the matter in question (*w*). Again, where the inhabitants of a parish had indicted those of a county for non-repair of a bridge, and the question was, which of the litigants were liable to repair it, the Court refused to compel the prosecutors to allow the defendants to inspect the parish documents, which related to the repair of the bridge (*x*).

§ 1105. The books kept by *commissioners of sewers* may be mentioned in the same category with parish books; that is, strangers are not entitled to inspect them; and even parties

(*r*) *Newell v. Simpkin*, 6 Bing. 565.

(*s*) *May v. Gwynne*, 4 B. & A. 301. In *R. v. Harrison*, 2 Sess. Cas. 490, the Court refused to grant a mandamus for a rate-payer of a township to inspect the appointment of overseers of the poor for that township.

(*t*) *May v. Gwynne*, 4 B. & A. 301.

(*u*) *R. v. Smallpiece*, 2 Chit. R. 288.

(*v*) *Burrell v. Nicholson*, 3 B. & Ad. 649.

(*w*) *Burrell v. Nicholson*, 1 Myl. & K. 680.

(*x*) *R. v. Buckingham Js.*, 8 B. & C. 375.

assessed to the sewers-rate have no general right of inspection, but can only claim access to such entries and proceedings as have reference to the rate to which they are themselves assessed, and to the level where their property is situated (*y*). So, where a person was prosecuted for practising physic, not being a member of the College of Physicians, nor having a licence, nor being a graduate of either university, the Court refused to grant him a rule to inspect the *books of the college*, on the ground that he was not a member of that body (*z*). It has been held, however, that a *bishop's register of presentations and institutions* is kept for the use of all persons claiming title to livings in his diocese; and, accordingly, where the bishop himself and a private person were adverse claimants of the patronage of a particular benefice, the Court granted a mandamus to compel the bishop to allow his opponent to inspect so much of the register as related to the benefice in question (*a*). So, a prebendary may, at all reasonable times, inspect such of the charters, statutes, injunctions, and acts of the Chapter as may be necessary to establish or illustrate his rights concerning his prebend (*b*). On a similar principle, *fundholders* have been held entitled to inspect and take copies of such entries in the *deposit and transfer books of the Bank of England* (*c*), or of the *East India Company* (*d*), as relate to stock in which they claim to be interested; and merchants can demand access to such of the *Custom-house books* as contain entries with regard to their goods (*e*). The same doctrine renders a limited inspection of many other books and documents a matter of right, when they constitute the common evidence of transactions between public offices and private individuals, and where the inspection is necessary to establish some disputed claim (*f*). On the other hand,

(*y*) *R. v. Comm. of Sewers for the Tower Hamlets*, 3 Q. B. 670.

(*z*) *R. v. Dr. West*, cited 2 Wils. 240; 5 Mod. 395, 396, S. C.

(*a*) *R. v. Bp. of Ely*, 8 B. & C. 112; S. C. nom. *Finch v. Bp. of Ely*, 2 M. & Ry. 127.

(*b*) *Young v. Lynch*, 1 W. Bl. 27.

(*c*) *Foster v. Bank of England*, 15 Law J. N. S., Q. B. 212.

(*d*) *Geery v. Hopkins*, 2 Lord Raym. 851; 7 Mod. 129, S. C.

(*e*) *Crew v. Saunders*, 2 Str. 1005.

(*f*) See note by Mr. Nolan to *R. v. Hostmen of Newcastle*, 2 Stra. 1223, where all the older authorities on the subject are collected and classified. See also *R. v. King*, 2 T. R. 235, per Ashurst, J., as to the assessments of the land-tax.

access to these books will not be granted in favour of persons who have either no interest in them, or who seek to inspect them for some private object unconnected with the purposes for which the books are kept. For instance, where a party brought a *qui tam* action against a postmaster for interfering in the election of a member of Parliament, the Court refused the plaintiff a rule to inspect the books of the Post-office, because the suit did not relate to any transaction in that office, and the applicant had no interest in its books (*k*).

§ 1106. From one or two of the cases mentioned above, the student will have seen that a court of equity will, under certain circumstances, permit a discovery, where a court of law will not grant an inspection (*l*). As, however, the doctrines of equity which relate to discovery, do not depend on the *public* character of the instrument sought to be inspected, it will be more convenient to postpone any observations on those doctrines, till we come, in the next chapter, to discuss the mode of obtaining the inspection of private writings. But, we may here observe, that, in accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence, that may expose him to a criminal charge (*m*), neither the Court of Queen's Bench, nor the Court of Chancery (*n*), will ever oblige a person to allow the inspection of either public or private documents in his custody, where the inspection is sought for the purpose of *supporting a prosecution against himself* (*o*). An information in the nature of a *quo warranto* is not considered as a criminal proceeding within the meaning of this rule (*p*); but where the lord of a manor was indicted for not repairing the bank of a river *ratione tenuræ*, it was in vain urged

(*k*) *Crew v. Saunders*, 2 Stra. 1005. See *Atherfold v. Beard*, 2 T. R. 610; *Benson v. Post*, 1 Wils. 240. See also, ante, § 1104.

(*l*) Ante, § 1104.

(*m*) Ante, § 1068.

(*n*) Wigram on Discovery, §§ 130—132, 268—270, 285, et seq. In *Lord Montague v. Dudman*, 2 Ves. Sen. 397, Lord Hardwicke observed, that a bill of discovery would not lie "to aid the prosecution of an indictment or information or to aid the defence of it." See also *Glyn v. Houston*, 1 Keen, 329.

(*o*) *R. v. Purnell*, 1 W. Bl. 37; 1 Wils. 239, S. C.; *R. v. Heydon*, 1 W. Bl. 351; *R. v. Buckingham Js.*, 8 B. & C. 375; *R. v. Cornelius*, 2 Stra. 1210; 1 Wils. 142, S. C. See *Bradshaw v. Murphy*, 7 C. & P. 712, sed qu.

(*p*) *R. v. Shelley*, 3 T. R. 141; *R. v. Babb*, id. 582; *R. v. Purnell*, 1 W. Bl. 45.

in support of a rule to inspect the court rolls, that the indictment, though in form a criminal proceeding, was really to try the right of repair, which was a civil right (*q*).

§ 1107. Where writs, or other proceedings in a cause, are officially in the custody of an officer of the court, it may be doubtful whether he can be compelled to permit them to be inspected, for the purpose of furnishing evidence in a civil action against himself. For instance, if an action be brought against the keeper of the Queen's prison (*r*) for the escape of a debtor, has the plaintiff a right to inspect the writ by which the debtor was committed to the defendant's custody? On this point the Courts of Queen's Bench and of Common Pleas have come to opposite conclusions (*s*).

§ 1108. In all cases where the interference of a court of law is required in order to obtain the inspection of a document, it must appear by affidavit that an express *demand* to inspect has been made to the proper quarter, and has been distinctly *refused* (*t*). It seems also, that this demand must come, either directly from the applicant or indirectly from his agent, and that it will not suffice if it be made by a person whom the agent has employed for that purpose (*u*). In stating that there must be a distinct refusal, it is not meant that the word "refuse" or any equivalent expression should be employed, but it will be enough if the party applied to shows clearly by his conduct that he is determined not to do what is required (*x*). Still, nothing short of this will suffice; and therefore, where a shareholder in a company applied to the committee for leave to inspect the books of the company, and was told by the chairman that the committee would take time to consider the

(*q*) *R. v. E. Cadogan*, 5 B. & A. 902; 1 D. & R. 550, S. C.

(*r*) 5 & 6 Vict. c. 22.

(*s*) *Fox v. Jones*, 7 B. & C. 732; *Davies v. Brown*, 9 Moore, 778. See also *R. v. Chester, Sheriff of*, 1 Chit. R. 477.

(*t*) *R. v. Wilts and Berks Can. Co.*, 3 A. & E. 477; 5 N. & M. 344, S. C.; *R. v. Bristol and Exeter Rail. Co.*, 4 Q. B. 162. But the objection that the affidavits disclose no sufficient demand and refusal must be taken before the merits are discussed, 4 Q. B. 171, per Lord Denman, recognising *R. v. East. Count. Rail. Co.*, 10 A. & E. 531, 545, n. (*b*).

(*u*) *Ex parte Hutt*, 7 Dowl. 690.

(*x*) *R. v. Brecknock and Aberg. Can. Co.*, 3 A. & E. 222, 223, per Lord Denman and Littledale, J.

request; whereupon, ten days afterwards, he again applied to the clerk, who refused inspection, though it did not appear that the refusal was authorised by the committee; the Court of Queen's Bench held that there was no sufficient refusal by the committee to warrant the making absolute a rule for a mandamus (y). If on the application of a party, the liberty to inspect books be *offered as a favour*, though *not as a right*, and be consequently declined by the applicant, it may be questionable whether the Court of Queen's Bench will interfere (z). Where a party applied to a judge on summons for leave to inspect certain books, but the judge, after hearing both parties, referred the question to the Court, it seems to have been considered that the proceedings at chambers were equivalent to a demand and refusal (a).

§ 1109. We have hitherto been considering those cases where the right of inspection depends upon the common law; but it now becomes necessary to advert to some *statutes* which especially provide for the keeping of particular public documents, and for their inspection by parties interested. Thus, the *Act for registering births, deaths, and marriages*, entitles any person to search the register books of those events, and the indexes thereto, and to demand certified copies of any entry in the books, on payment of a small fee (b); the *Act for marriages*, passed in the last reign,

(y) *R. v. Wilts and Berks Can. Co.*, 3 A. & E. 477; 5 N. & M. 344, S. C.

(z) *R. v. Trustees of Northleach and Witney Roads*, 5 B. & Ad. 978, 982, per Lord Denman.

(a) *Birmingham, Bristol, and Thames Junct. Rail. Co. v. White*, 1 Q. B. 282, 286; 4 Per. & D. 649, S. C.

(b) 6 & 7 Will. 4, c. 86, § 35, enacts, "that every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register-book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of any register-book in his keeping, and shall give a copy certified under his hand of any entry or entries in the same, on payment of the fee hereinafter mentioned; (that is to say,) for every search extending over a period not more than one year, the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate."

§ 36 enacts, "that every superintendent-registrar shall cause indexes of the register-books in his office to be made, and kept with the other records of his office; and that every person shall be entitled at all reasonable hours to search the said indexes, and to have a certified copy of any entry or entries in the said register-books under the hand of the superintendent-registrar, on payment of the fees hereinafter mentioned; (that is to say,) for every general search the sum of

provides, that the "marriage notice book," which the superintendent-registrar is bound to keep, shall be "open at all reasonable times without fee to all persons desirous of inspecting the same" (c); while, under the Act of 3 & 4 Vict. c. 92, which provides for the deposit of certain *non-parochial registers* (d) in the custody of the registrar-general, every person is entitled, on payment of certain

five shillings, and for every particular search the sum of one shilling, and for every certified copy the sum of two shillings and sixpence."

§ 37 enacts, "that the registrar-general shall cause indexes of all the said certified copies of the registers to be made, and kept in the general register office; and that every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said indexes between the hours of ten in the morning and four in the afternoon of every day, except Sundays, Christmas-day, and Good Friday, and to have a certified copy of any entry in the said certified copies of the registers; and for every general search of the said indexes shall be paid the sum of twenty shillings, and for every particular search the sum of one shilling; and for every such certified copy the sum of two shillings and sixpence, and no more, shall be paid to the registrar-general, or such other officer as shall be appointed for that purpose on his account." The Act for registering marriages in Ireland contains similar provisions. See §§ 68—70 of 7 & 8 Vict. c. 81, Ir. See also 52 Geo. 3, c. 146, § 5.

(c) 6 & 7 Will. 4, c. 85, § 5; 7 & 8 Vict. c. 81, §§ 2, 14, Ir.

(d) These registers consist of more than seven thousand books, belonging to one or other of the following religious communities:—The foreign Protestant churches in England; the Quakers; the Presbyterians; the Independents; the Baptists; the Wesleyan Methodists, in their several branches; the Moravians; the Countess of Huntingdon's connexion; the Calvinistic Methodists; and the Swedenborgians. Besides these, a few registers have been deposited, which belong either to Roman Catholic, Irvingite, Inghamite, Bible Christian, New Jerusalemite, Unitarian, or Scotch Church congregations. The registers transmitted from the foreign Protestant churches contain entries of births, baptisms, marriages, deaths, and burials; and those sent by the Quakers are registers of births, marriages, and deaths. The remaining books are for the most part registers of births or baptisms, but there are some registers of deaths or burials, and one or two registers of marriages. The dates of these books range from the middle of the 16th century to the year 1840. Most of the registers were sent to the registrar-general from the minister of the congregation to which they belonged, but a valuable collection of these documents was transmitted from Dr. Williams' library, in Redcross-street, and another smaller one from the Wesleyan Registry in Paternoster-row. It may be observed, that the Jews have declined to part with their registers, as have also the Roman Catholic prelates in most instances. The registers, too, of births and deaths, which are kept at the Herald's College, from the year 1747 to 1783; the records of Indian baptisms, deaths, and marriages, deposited at the India House; and the registers of births, baptisms, marriages, and burials of British subjects abroad, transmitted to the registry of the Consistory Court of London, are excluded from the operation of the Act. See Report of Commissioners appointed to inquire into the state, &c., of non-parochial registers, which was presented to Parliament in 1838.

fees, but *upon personal application only* (*e*), to inspect these registers and the lists of the same (*f*), and to have certified extracts of such entries as he may require (*g*).

§ 1110. Again, the *Municipal Corporation Act* (*h*) provides, that the town-clerk (*i*) of every borough shall, under a penalty of 50*l.* (*k*), allow any person to peruse, without fee, first, the freeman's roll at all reasonable times (*l*), and next, the list of persons, either claiming to have their names inserted in the burgess-list, or objected to as not entitled to be enrolled therein, at all reasonable hours during the eight days, Sunday excepted, next preceding each 1st of October (*m*); and he is further bound to furnish copies of these respective documents, as also a copy of the burgess-roll, to every person requiring the same, on payment of a reasonable price (*n*). Moreover, the treasurer of every borough must keep accounts of his receipts and disbursements, to be open at all reasonable times to the inspection of any of the aldermen or councillors, who are at

(*e*) See fly-sheet to "Lists of Non-parochial Registers," published by the registrar-general, pursuant to the Act, in 1841.

(*f*) A list of the non-parochial registers in the custody of the registrar-general, was published in 1841, and contains a statement—1, of the number marked on each register—2, of the name of the place of worship—3, of the denomination and date of the foundation—4, of the name of the last minister—5, of the number of the books deposited, and the nature of the entries—and, 6, of the period over which each register extends. Copies of this list have been sent to every person, congregation, or society, having had the custody of any of the deposited registers, as also to every superintendent-registrar, and to the registrar-general, to be open for inspection at the respective offices, without fee.

(*g*) § 5 enacts, "that the registrar-general shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this Act; and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists, and any register or record therein mentioned, between the hours of ten in the morning and four in the afternoon of every day, except Sundays and Christmas-day, and Good Friday, but subject to such regulations as may be made from time to time by the registrar-general, with the approbation of one of Her Majesty's principal Secretaries of State, and to have a certified extract of any entry in the said registers or records; and for every search in any such register or record shall be paid the sum of one shilling; and for every such certified extract the sum of two shillings and sixpence, and no more."

(*h*) 5 & 6 Will. 4, c. 76.

(*i*) See § 16, as to the course of proceeding, if there be no town clerk.

(*k*) § 48.

(*l*) § 5.

(*m*) § 17.

(*n*) §§ 5, 17, 23.

liberty to take copies or extracts from them; and after such accounts have been audited each year, he must make out a full abstract of their contents, a copy of which may be inspected or purchased by any rate-payer (*o*). Every burgess, too, is entitled, at all reasonable times, to inspect, and take copies or extracts from, the book in which are entered the minutes of the borough council, and any order in council for the payment of any money (*p*).

§ 1111. Under the Act regulating *Joint-stock Banks* every person is at liberty, on payment of one shilling, to inspect at the Stamp-office the book in which the name of the firm, and the names and places of abode of the members and directors, are registered (*q*). Again, under the Act of 7 & 8 Vict. c. 110, any person may inspect, and require a certified copy or extract of, any return, deed, register, or index, which is kept by the *register of joint-stock companies* (*r*); and every shareholder of a company duly registered under that Act is entitled, subject to the provisions of the deed of settlement, or of any bye-law, to inspect, at all reasonable times, the books of the company in which their proceedings are recorded (*s*), and at stated times to examine, and take extracts from, the books of account, and the balance-sheet of the company (*t*). The shareholders have also a right, either personally, or by some agent appointed in writing, to inspect, during the usual hours of business, the abstract of the deed of settlement, the list of shareholders, the list of directors and officers, and the copy of the bye-laws; that is, as soon as the company has been completely registered (*u*).

(*o*) § 93; 7 Will. 4 & 1 Vict. c. 78, § 22.

(*p*) 7 Will. 4 & 1 Vict. c. 78, § 22; 5 & 6 Will. 4, c. 76, § 69.

(*q*) 7 & 8 Vict. c. 113, § 16. See 9 & 10 Vict. c. 75, which extends this Act to Scotland and Ireland.

(*r*) § 18.

(*s*) § 33.

(*t*) § 37 enacts, "that during the space of fourteen days previously to [each] ordinary meeting [of the shareholders,] and also during one month thereafter, every shareholder of the company may, subject to the provisions of the deed of settlement, or of any bye-law, inspect the books of account and the balance-sheet of the company, and take copies thereof and extracts therefrom; and that if at any other time three directors authorise in writing any shareholder to make such inspection, then at such other time the shareholder so authorised may make such inspection."

(*u*) § 57 enacts, "that, at every principal place of business of any joint-stock company completely registered under this Act, it shall be the duty of the directors and officers of the company, and they are hereby respectively required, to have

So, the *Companies Clauses Consolidation Act*, which applies to every joint-stock company incorporated by statute, since the 8th of May, 1845, for the purpose of carrying on any undertaking, contains several provisions authorising parties interested to inspect and demand copies of the books and documents relating to the company's affairs (x); and the same observations may be made with

written or printed copies of an index or abstract of the deed of settlement, approved by the registrar of joint-stock companies, and a list of the shareholders of the company, and the number of shares held by each, and also a list of the directors and officers thereof, and a copy of the bye-laws, sealed with the seal of the company, as returned to the said registry office; and that if at any reasonable time any shareholder, or any person authorised in writing by him, apply at any such place of business of the company to inspect the same, then, on demand thereof made during the usual hours of business, it shall be the duty of the directors or officers, and they respectively are hereby required, to permit such inspection; and that if on such demand any such director or officer, to whom such demand is made, do not thereupon permit such inspection, then on conviction thereof, he shall be liable to pay for every such offence a sum not exceeding forty shillings." See also § 50.

(x) 8 & 9 Vict. c. 16, § 10 enacts, that "in addition to the register of shareholders, the company shall provide a book, to be called the 'Shareholder's Address Book,' in which the secretary shall, from time to time, enter in alphabetical order the corporate names and places of business of the several shareholders of the company, being corporations, and the surnames of the several other shareholders with their respective Christian names, places of abode, and descriptions, so far as the same shall be known to the company; and every shareholder, or if such shareholder be a corporation, the clerk or agent of such corporation, may at all convenient times peruse such book *gratis*, and may require a copy thereof or of any part thereof; and for every hundred words so required to be copied, the company may demand a sum not exceeding sixpence." § 45 enacts, that "a register of mortgages and bonds shall be kept by the secretary, and within fourteen days after the date of any such mortgage or bond, an entry or memorial specifying the number and date of such mortgage or bond, and the sums secured thereby, and the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor of the company, or by any person interested in any such mortgage or bond, without fee or reward." § 63 enacts, "that the company shall from time to time cause the names of the several parties who may be interested in [the general capital stock of the company], with the amount of the interest therein possessed by them respectively, to be entered in a book to be kept for that purpose, and to be called the 'Register of Holders of Consolidated Stock;' and such book shall be accessible at all reasonable times to the several holders of shares or stock in the undertaking." §§ 115, 116, provide, "that accounts shall be kept by the directors, and that the books of the company shall be balanced at certain periods." § 117 then enacts, that "the books so balanced, together with such balance-sheet as aforesaid, shall for the prescribed periods, and, if no periods be prescribed, for fourteen days previous to

respect to the *Commissioners Clauses Act* (*w*), and several other *Consolidation Acts* passed in 1847 (*x*). The *Railway Clauses Consolidation Act* (*y*), which applies to all railways authorised to be constructed since the 8th of May, 1845, contains also an important provision on this subject, for it enacts, in § 107, that every railway company, subject to that Act, shall, if required, transmit a copy of its annual account of disbursements and receipts, duly audited, and free of charge, to the overseers of the poor of the several parishes, and to the clerks of the peace of the counties through which the railway shall pass; and such accounts shall be open to the inspection of the public at all reasonable hours, on payment of one shilling. An easy mode is thus afforded of ascertaining the sum at which the company should be assessed to the parochial and county rates.

§ 1112. Again, the *Copyright Amendment Act* (*z*) provides, and

each ordinary meeting, and for one month thereafter, be open for the inspection of the shareholders at the principal office or place of business of the company; but the shareholders shall not be entitled at any time, except during the periods aforesaid, to demand the inspection of such books, unless in virtue of a written order signed by three of the directors." § 118 enacts, that "the directors shall produce to the shareholders assembled at such ordinary meeting, the said balance-sheet, applicable to the period immediately preceding such meeting, together with the report of the auditors thereon, as hereinbefore provided." § 119 enacts, "that the directors shall appoint a book-keeper to enter the accounts aforesaid in books to be provided for the purpose; and every such book-keeper shall permit any shareholder to inspect such books, and take copies or extracts therefrom, at any reasonable time during the prescribed periods, and if no periods be prescribed, during one fortnight before, and one month after, every ordinary meeting; and if he fail to permit any such shareholder to inspect such books, or take copies or extracts therefrom, during the periods aforesaid, he shall forfeit to such shareholder for every such offence a sum not exceeding five pounds."

(*w*) 10 & 11 Vict. c. 16, §§ 31, 55, 76, 88—90.

(*x*) See *Markets and Fairs Cl. Act*, 10 & 11 Vict. c. 14, § 50; *Gas-works Cl. Act*, id. c. 15, § 38; *Water-works Cl. Act*, id. c. 17, § 83; *Harbours, Docks, and Piers Cl. Act*, id. c. 27, § 50.

(*y*) 8 & 9 Vict. c. 20.

(*z*) 5 & 6 Vict. c. 45, § 11 enacts, "that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignment thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person on payment of one shilling for every entry which shall be searched for, or

the provision is incorporated in the *International Copyright Act* (a) that a register of the proprietorship of copyright, and of the assignments thereof, shall be kept at the Hall of the Stationers' Company, and shall, at all convenient times, be open to the inspection of any person, on payment of one shilling for every entry inspected; and the officer of the company is also required, on payment of five shillings, to give a certified copy of any entry to any person demanding it. So, under the Acts which relate to the *Copyright of Designs* for Articles of Manufacture, every person is entitled to inspect, at the registrar's-office, any design whereof the copyright has expired, and a limited inspection of the designs, the copyright of which is still in force, is also allowed (b).

§ 1113. Under the Act of 6 & 7 Vict. c. 73, every person is entitled, without fee, to have free access to the *rolls of attornies* and solicitors, which are kept by the Masters or other officers of the respective courts of law and equity;—to the books containing an abstract of the affidavits sworn by such attornies or solicitors as have articulated clerks, which books are placed under the same custody as the rolls;—and to the books, kept by the registrar, in which are entered the particulars of the declarations signed by attornies and solicitors preparatory to obtaining their certificates (c).

§ 1114. By the Act of 7 Will. 4 & 1 Vict. c. 83, clerks of the peace, town-clerks, and other persons holding official situations, are required to take custody of all maps, plans, sections, books, and writings, which by the standing Orders of either House of Parlia-

inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, *certified under his hand and impressed with a stamp* of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such *copies so certified and impressed* shall be received in evidence in all courts, and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and, in case of dramatic or musical pieces, shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid."

(a) 7 & 8 Vict. c. 12, § 8.

(b) 5 & 6 Vict. c. 100, § 17; 6 & 7 Vict. c. 65, § 10.

(c) §§ 11, 20, 23.

ment are directed to be deposited with them, previous to the introduction of any railway bill, or other bill of a like nature; and the same statute enacts, that all persons interested shall have liberty to inspect, and take copies of, or extracts from, these documents, on payment of certain regulated fees. The provisions of this Act have been extended by several consolidation and other Acts to the maps, plans, and sections of other undertakings, and to the maps, plans, and sections of alterations proposed to be made therein (*d*); as also to copies of the Special Acts, by which particular companies, commissioners, or other undertakers have been authorised to act (*e*).

§ 1115. Under the *Jurors' Act*, the churchwardens and overseers of every parish are directed to make out a list of every person qualified to serve on juries, and to allow such list to be perused gratis by any inhabitant, at all reasonable times during the first three weeks of September (*f*); and the jurors' list is directed to be kept at the sheriff's office for seven days at least before the sitting of every court, there to be inspected, without fee, by the parties in all causes to be tried at such court, and by their attorneys (*g*).

§ 1116. Under the Act for *registering persons entitled to vote for members of parliament*, every person is at liberty, during the fortnight next after publication, to inspect gratis the lists of claimants, the registers of voters, and the lists of persons objected to, which are made out by the overseers and town-clerks respectively,

(*d*) See Rail. Cl. Consol. Act, 8 & 9 Vict. c. 20, § 9; do. for Scotl. id. c. 33, § 9; Waterworks Cl. Act, 10 & 11 Vict. c. 17, § 21.

(*e*) Comp. Cl. Consol. Act, 8 & 9 Vict. c. 16, § 161; do. for Scotl. id. c. 17, § 165; Lands Cl. Consol. Act, id. c. 18, § 160; do. for Scotl. id. c. 19, § 142; Rail. Cl. Consol. Act, id. c. 20, § 162; do. for Scotl. id. c. 33, § 153; Markets and Fairs Cl. Act, 10 & 11 Vict. c. 14, § 58; Gas Works Cl. Act, id. c. 15, § 45; Comm. Cl. Act, id. c. 16, § 110; Waterworks Cl. Act, id. c. 17, § 90; Harbours, Docks, and Piers Cl. Act, id. c. 27, § 97; Towns Improvement Cl. Act, id. c. 34, § 214; Cemeteries Cl. Act, id. c. 65, § 66; and Town Police Cl. Act, id. c. 89, § 77. See also 9 & 10 Vict. c. 39, § 6, as to plans and sections of the new suspension bridge at Chelsea, which are deposited with the Commissioners of Woods and Forests, and 9 & 10 Vict., c. 3, § 13, as to plans, &c. of harbours and other works in Ireland, constructed by commissioners for the purpose of encouraging sea fisheries.

(*f*) 6 Geo. 4, c. 50, § 9.

(*g*) Id. § 19. As to the practice in Ireland, see 3 & 4 Will. 4, c. 91, §§ 8, 14, and 8 & 9 Vict. c. 67, § 3.

as also to obtain written or printed copies of these documents, on payment of a small sum (*h*). So, after the registers have been revised, any person may purchase, at a stipulated price, from the clerk of the peace, a printed copy of the county register, and from the town-clerk, a like copy of the borough register (*i*); and when the poll-books have been deposited with the Clerk of the Crown in Chancery, any party may inspect them, and, on payment of a reasonable sum, obtain an office copy of the whole, or of any part thereof (*k*). Under the same Act, every registered elector and claimant may, between the 10th and 31st of August, without payment of any fee, inspect and take extracts from any poor-rate book, for any purpose relating to any claim or objection, made, or intended to be made, by or against him (*l*).

§ 1117. Under the *Poor-law Act*, every owner of property, or his agent, and every rate-payer, is entitled to inspect gratis the rules sent by the commissioners to the overseer of his parish, or the guardians of his union, as also to take copies of such rules, or to require copies to be furnished to him, on payment of a trifling charge (*m*). For seven days, too, before the auditing of the overseers' accounts, their rate-books are open, between the hours of eleven and three, for the inspection of every person liable to be rated to the relief of the poor (*n*).

§ 1118. Under the *Highway Act*, the surveyors are directed to keep books of account, and these books are open at all reasonable times to the inspection of all inhabitants rated to the highway rate of the parish or district, who are also entitled to take copies or extracts from them without fee (*o*). So, under the Acts regulating the *Turnpike-roads*, the books containing the oaths, orders, accounts, and proceedings of the trustees, as well as those kept for registering mortgages or assignments, may be inspected and copied gratis, at all reasonable times, by the trustees or by any

(*h*) 6 & 7 Vict. c. 18, §§ 5, 8, 13, 14, 18, 20.

(*i*) § 49.

(*k*) § 95.

(*l*) § 16.

(*m*) 4 & 5 Will. 4, c. 76, § 18. See 10 & 11 Vict. c. 109, §§ 10, 29.

(*n*) 7 & 8 Vict. c. 101, § 33. See also 17 Geo. 2, c. 3, § 8; 6 & 7 Will. 4, c. 96, § 5; and *Tennant v. Creston*, 2 Sess. Cas. 425.

(*o*) 5 & 6 Will. 4, c. 50, § 40.

creditor of the tolls (*p*); while, by the Act relating to *Turnpike-trusts in South Wales*, similar books, kept by the County Roads' Board, may be inspected and copied without fee by all members of such board, and of all district boards within the county, and by every person paying any rate by that Act authorised to be made (*q*).

§ 1119. Every member of a *friendly society* is entitled, by statute, to inspect, at all seasonable times, the book in which the rules of the society have been entered by the proper officer (*r*); and moreover, on payment of a trifling sum, to receive a copy of the periodical statement of accounts, which the treasurer or other principal officer of the society is bound to prepare, once at least in every year (*s*). So, the books of accounts, which the commissioners of *public baths* are directed to keep, may be examined and copied gratis by any commissioner, churchwarden, overseer, or ratepayer, of the parish in which the baths are established (*t*).

§ 1120. Again, every person is entitled to inspect, on payment of a small sum, the *warrants of attorney* to confess judgment, and *cognovits actionem*, which must now be filed in the Queen's Bench within twenty-one days after their respective execution; as also the books and indexes relating to these documents, which the officer of the Court is directed to keep (*u*). So, all persons, on payment of one shilling, are at liberty to search the *book kept by the senior Master of the Common Pleas*, which contains an alphabetical list of the persons whose real estate is intended to be affected by judgments of the superior courts, decrees or orders of courts of equity, rules of courts of common law, or orders in bankruptcy or lunacy (*x*); as also the "index to debtors and accountants to the Crown," which is kept by the same officer (*y*). So, *certificates of naturalisation*, which are enrolled in the Court of Chancery, may, subject to certain regulations made by the Lord Chancellor, be inspected and

(*p*) 3 Geo. 4, c. 126, §§ 72, 73; 9 Geo. 4, c. 77, § 2.

(*q*) 7 & 8 Vict. c. 91, § 71.

(*r*) 10 Geo. 4, c. 56, § 7.

(*s*) § 33.

(*t*) 9 & 10 Vict. c. 74, § 14; id. c. 87, § 5, Ir.

(*u*) 3 Geo. 4, c. 39, §§ 1, 3, 5; 6 & 7 Vict. c. 66.

(*x*) 1 & 2 Vict. c. 110, § 19; 2 & 3 Vict. c. 11, §§ 3, 8; 3 & 4 Vict. c. 82, § 2.

(*y*) 2 & 3 Vict. c. 11, §§ 8, 9.

copied (z). So, the *returns* which surveyors are required to make to the *registrar of metropolitan buildings*, and the awards, certificates, and other documents of the official referees, which are directed to be kept in the office of the said registrar, are open to general inspection at all seasonable times, on payment of a small fee; and the registrar is bound to give, under his hand and seal of office, a copy or extract of any of these documents, to any person demanding it, who is ready to pay for the same (a). So, also, the collector or comptroller of the Customs at any port, is required, by the *Act for registering British vessels*, to allow any person to inspect and take copies of any oath or declaration made by the owner or proprietor of a ship, as also any register required by that Act to be kept relative to any vessel (b). So, any person is entitled to inspect gratis the *register of coalwhippers* (c). In addition to this long and repulsive string of statutes, many other public Acts, and a vast number of local and personal Acts, contain provisions enabling interested persons to inspect and obtain copies of particular documents.

§ 1121. We proceed now, in the SECOND PLACE, to consider the MODE OF PROOF OF PUBLIC DOCUMENTS. And, first, as to *legislative acts*. We have already seen that *public statutes* need no proof, being supposed to exist in the memories of all (d). Still, for certainty of recollection, reference is had to a printed copy, and if there be any reason to suspect the accuracy of the copy, the Court will consult the Parliament roll (e). In most of the *local and personal Acts* it has been customary for many years to insert a clause, declaring that the Act shall be deemed to be public, and shall be judicially noticed as such; and the effect of this clause is not only to dispense with the necessity of pleading the Act specially, but to render it unnecessary to produce an examined copy, or a copy proved to have been printed by the printer for the Crown (f). When this clause is omitted, the simplest mode of proving the Act,

(z) 7 & 8 Vict. c. 66, § 9.

(b) 8 & 9 Vict. c. 89, § 43.

(d) Ante, § 5.

(f) Woodward v. Cotton, 1 C. M. & R. 44, 47; Beaumont v. Beale, 10 Bing.

404. These cases explain, and partially overrule, Brett v. Beales, M. & M. 421.

(a) 7 & 8 Vict. c. 84, §§ 78, 91.

(c) 9 & 10 Vict. c. 36, § 13.

(e) R. v. Jeffries, 1 Stra. 446.

whether it be local and personal, or merely *private*, is by producing a copy, which, if it *purports* to be printed by the Queen's printer, need not be proved to be so (*g*) ; or the Act may be proved by means of an examined copy, shown on oath to have been compared with the Parliament roll (*h*). Where the Acts are not printed, by the printers for the Crown, as is sometimes the case with respect to Acts for naturalising aliens, for dissolving marriages, for inclosing lands, and for other purposes of a strictly personal character, an examined copy, or a certified transcript into Chancery, if there be one (*i*), furnishes the regular proof.

§ 1122. Before leaving the subject of legislative Acts, we may observe, that the *statutes passed in Ireland prior to the Union* are conclusively proved in any court of Great Britain by producing a copy of them printed and published by the printer for the Crown ; and, in like manner, the copies of the statutes of England and of Great Britain, which have been printed and published by the government printer, are receivable as conclusive evidence in any court in Ireland (*k*).

§ 1123. It has been already remarked, that the *statute or written law of any foreign nation* cannot be proved, in English courts of justice, by the production of a copy of the law, however well authenticated ; but that in all cases it is necessary to call some person, skilled in the foreign law, to prove the existence and meaning of the statute or code on which reliance is placed (*l*).

§ 1124. Next, as to *Acts of state*. These may be proved in various ways, according to the nature of the document. Thus, a *royal proclamation* may be proved, by producing either the original,

(*g*) 8 & 9 Vict. c. 113, § 3, cited ante, § 7.

(*h*) B. N. P. 225.

(*i*) *Roos Barony*, Min. Ev. 145, cited Hubb. Ev. 613.

(*k*) 41 Geo. 3, c. 90, § 9. It is presumed that this section would be satisfied by producing a copy which *purported* to be printed by the government printer, without proof that it was actually so printed. The words, however, in their strict sense, do not admit of this construction, and the evil is not remedied by the late Documentary Evidence Act, 8 & 9 Vict. c. 113, see ante, § 7. See *Woodward v. Cotton*, 1 C. M. & R. 48.

(*l*) Ante, §§ 1042, 1043.

or a copy purporting to be printed by the printer to the Crown (*m*), or an examined copy, or the Gazette in which it has been inserted (*n*); for, as before stated (*o*), it seems that the Courts are bound to take judicial notice of the Gazette, without any proof whence it came, or by whom it was printed. Again, *British treaties* may be proved, by producing either the originals, or copies exemplified under the Great Seal, or examined copies, or copies coming from the government press; but, in this last case, it may be doubtful whether the Courts would be satisfied, without proof that the copy was actually printed by the printer for the Crown. *Charters, letters-patent, grants from the Crown, pardons, and commissions*, will be most conveniently proved by the production of the originals under the Great Seal, the Privy Seal, or the Royal Sign-manual; but as these are matters of public record (*p*), we apprehend they might also be proved by exemplifications under the Great Seal, or by examined copies.

§ 1125. It seems that the *Acts of state of a foreign government* can only be proved, either by producing an examined copy, sworn to have been compared with the original archives abroad, or, perhaps, by a copy exemplified under the Great Seal of the foreign State. In one case, where a book was tendered in evidence, which purported to be a collection of treaties concluded by America, and was declared to be published by authority there, as a regular copy of the archives in Washington; and it was further proposed to prove, by the American minister resident at this court, that the book was the rule of his conduct; Lord Ellenborough rejected the evidence, observing that he would not have admitted a book of Spanish treaties, though proved to have been printed by the King's printer in that country (*q*).

§ 1126. In regard to the *Journals* of either House of Parliament it has already been observed, that the late Documentary Evidence Act renders copies of these documents admissible in evidence, provided they *purport* to be printed by the printers to either

(*m*) 8 & 9 Vict. c. 113, § 3, cited ante, § 7.

(*n*) R. v. Holt, 5 T. R. 436.

(*o*) Ante, § 12.

(*p*) 2 Bl. Com. 346.

(*q*) Richardson v. Anderson, 1 Camp. 65, n. (*a*).

House of Parliament; and that it is not necessary to prove that the copies were in fact so printed (*r*).

§ 1127. The *Articles of War*, both in the land and marine service, being emanations respectively from the Crown and the Admiralty under the statute law, ought, like public Acts of Parliament, to be judicially noticed (*s*); but, in order to instruct the Court, a copy, purporting to be printed by the Queen's printer, or, in the case of the marine service, a copy certified under the hand of the Lord High Admiral, or under the hands of any two or more of the commissioners for executing his office, should be produced (*t*).

§ 1128. With respect to the *Rules, Orders, and Regulations* of the *late Poor-law Commissioners*, it seems that, although they are as valid and binding, and must be as much obeyed and observed, as if they were specifically made by, and embodied in, the Poor-law Amendment Act (*u*), the only legitimate, or, at least, the best, mode of bringing any of them to the knowledge of courts of justice, is by producing a copy (*x*) printed by the printer for the Crown; and if such copy be produced "after the lapse of fourteen days from the date thereof," it shall "be received in evidence, and judicially taken notice of, and shall, until the contrary be shown, be deemed sufficient proof that such order was duly made, and is in force" (*y*). Perhaps, also, the orders may be proved, by producing the original documents, and showing on oath that they come from the proper custody, provided they purport to bear the seal of the Commissioners' Office; or even by producing an examined copy, and showing that it has been compared with the original order, which

(*r*) 8 & 9 Vict. c. 113, § 3, cited ante, §§ 7, 8.

(*s*) Ante, § 5.

(*t*) *R. v. Withers*, cited by Buller, J., in *R. v. Holt*, 5 T. R. 446. See 10 & 11 Vict. c. 12, § 1, and 10 & 11 Vict. c. 13, § 1.

(*u*) 4 & 5 Will. 4, c. 76, § 42. See also §§ 15—20 of same Act. See, too, 10 & 11 Vict. c. 109, § 18, which provides, "that all lawful rules, orders, and regulations of the Poor-law Commissioners, made before the day on which the commissioners first appointed under this Act shall enter on their office, shall continue in full force and effect until rescinded or varied under the authority of this Act."

(*x*) Quære, purporting to be printed.

(*y*) 7 & 8 Vict. c. 101, § 71, ante, § 16.

is also proved to be genuine (*z*). The *present Poor-law Commissioners* are also empowered to make rules, orders, and regulations; but all such must be under their seal, and purport to be signed by at least two of the commissioners, or by the president and one of the secretaries, except those intended for the guidance or procedure of themselves, or of persons employed by them, for the business of their office; and if the *rules be general*, that is, if they are directed to, and affect more than, one union, or if they vary or rescind a general rule, whether they be directed to or affect one or more unions, they must be under seal, and under the hands of *three* or more of the commissioners, of whom the president shall be one (*a*). It seems that, by virtue of the Documentary Evidence Act, the signatures need not be proved to be authentic (*b*); and it is expressly enacted in the new Poor-law Act, that if the documents purport to be sealed or stamped with the Commissioners' seal, the genuineness of the seal need not be proved (*c*). The orders of the *Irish Poor-law Commissioners*, both late and present, may be proved by producing the originals or copies thereof, purporting to be sealed or stamped with the seal of the board; "but no such order or copy thereof shall be valid, or have any force or effect, unless the same shall be sealed or stamped as aforesaid" (*d*). The orders, too, of the present Poor-law Commissioners for Ireland must further purport to be signed by at least two of the commissioners, or by the chief commissioner, or, in his absence, by the assistant commissioner; and, in either of the last two cases, they must be countersigned by the secretary to the commissioners (*e*).

§ 1129. The *general records of the realm*, which are now placed under the custody of the Master of the Rolls, may be proved by copies purporting to be certified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed or stamped with the seal of the Record Office (*f*); and in cases of

(*z*) See 4 & 5 Will. 4, c. 76, § 18. (*a*) 10 & 11 Vict. c. 109, §§ 7, 14, 15.

(*b*) 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(*c*) 10 & 11 Vict. c. 109, § 5.

(*d*) 1 & 2 Vict. c. 56, § 121; 10 & 11 Vict. c. 90, § 3.

(*e*) 10 & 11 Vict. c. 90, § 18.

(*f*) 1 & 2 Vict. c. 94, § 12 enacts, "that the Master of the Rolls or deputy-keeper of the records may allow copies to be made of any records in the custody

importance before the House of Lords or elsewhere, permission will be given to one of the assistant keepers to produce the original record.

§ 1130. The next class of public documents to be considered consists of the *records of courts of justice*, and other judicial writings. And, first, as to the *records* of the *superior courts* of law and equity, and the *quasi records* of those courts. The expression "quasi records" will embrace depositions, affidavits, bills, answers, orders, and decrees, filed in Chancery, rules of court, and certain other documents, which, although not strictly records (*g*), partake so much of their nature, as to be capable, to the same extent as records, of being proved by means of copies (*h*), and as to be subject generally to the same rules of evidence. Indeed, we shall henceforth, for the sake of convenience, speak only of records, and include in that term all the documents just mentioned. Now, the records of the superior courts may either be proved by the mere production of the *originals*,—or, as this course would be highly inconvenient to the public if generally adopted, since it might lead to the mutilation or loss of valuable documents,—they may be also proved by means of *copies* (*i*). Of

of the Master of the Rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the deputy-keeper of the records, or one of the assistant record-keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." § 13 enacts, "that every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there as evidence."

(*g*) B. N. P. 235. The reason given by Mr. Justice Buller in this passage, why the proceedings in Chancery are not records, is sufficiently amusing. After stating that a record is "a memorial of what is the law of the nation," he adds, "now Chancery proceedings are no memorials of the laws of England, because the *Chancellor is not bound to proceed according to the laws*." As to rules of court not being records, see *R. v. Bingham*, 3 You. & Jer. 109, 112, 114.

(*h*) See as to decrees, B. N. P. 234, 235; as to bills and answers, *Ewer v. Ambrose*, 4 B. & C. 26; as to depositions in Chancery, *Highfield v. Peake*, M. & M. 109; as to rules of court, *Selby v. Harris*, 1 Lord Raym. 745; *Duncan v. Scott*, 1 Camp. 102.

(*i*) Ante, § 324. Post, § 1173.

these, there are *four kinds*; viz., exemplifications under the Great Seal; exemplifications under the seal of the particular court where the record remains; office copies; and examined copies (*k*).

§ 1181. One or other of these copies will always be admissible in lieu of the original record, *excepting in three cases*: first, if issue has been joined on a plea or replication of *nul tiel record* in some cause in a court, to which the disputed record belongs (*l*); secondly, if an affidavit, deposition, or answer enrolled in Chancery is required at a trial, for the purpose of cross-examining the deponent upon its contents (*m*); and, thirdly, if a person is indicted for perjury in any such affidavit, deposition, or answer, or for forgery with respect to any record (*n*). In either of these cases, the original document must be actually produced, and on a trial for perjury, the signatures of the defendant, and of the person whose name is attached to the jurat, must be proved (*o*). For the purpose of insuring the production of the original record, application should be made to the court to which it belongs, or to a judge in vacation, who will make the necessary order (*p*).

§ 1182. Where an issue is raised as to the *existence of a record*, which does *not belong to the same court*, the proof must be by an *exemplification under the Great Seal*; in order to obtain which, if the record does not belong to the Court of Chancery, a literal transcript of it must be removed thither by certiorari; for that is the centre of all the courts, and there the Great Seal is kept. An

(*k*) B. N. P. 226—238.

(*l*) 2 Ph. Ev. 129.

(*m*) *Bastard v. Smith*, 10 A. & E. 214; *Queen's case*, 2 B. & B. 286; ante, § 1058.

(*n*) B. N. P. 239; *R. v. Morris*, 2 Burr. 1189; *R. v. Benson*, 2 Camp. 508; *R. v. Spencer*, Ry. & M. 97; *Crook v. Dowling*, 3 Doug. 77; *Stratford v. Greene*, 2 Ball & Beat. 296; *Lady Dartmouth v. Roberts*, 16 East, 340, per Lord Ellenborough and Le Blanc, J. In this last case the judges intimated an opinion, that the same strictness was necessary in actions for malicious prosecution; but this would seem to be a mistake. See B. N. P. 13; *Purcell v. M'Namara*, 1 Camp. 200.

(*o*) See cases cited in last note.

(*p*) *Crook v. Dowling*, 3 Doug. 77, per Lord Mansfield; *Bastard v. Smith*, 10 A. & E. 214; *Bentall v. Sydney*, id. 164. The application to the Court of Chancery for leave to take an answer off the file, in order to prosecute the defendant for perjury, will be granted as a matter of right. *Stratford v. Greene*, 2 Ball & Beat. 294; *Keinan v. Boylan*, 1 Sch. & Lef. 232.

exemplification will then be transmitted by mittimus out of Chancery to the court in which the cause is pending (*q*).

§ 1133. When the existence or contents of the record are *not directly in issue*, it may, at common law, be always proved by the second kind of exemplification, though practically recourse is seldom had to this medium of proof, where the record belongs to one of the superior courts. With respect to both species of *exemplifications* it may be observed, that they are *proved by mere production*, as the judges are bound to take judicial notice of the seals attached to them (*s*); and we may add, that they are deemed of higher credit than examined copies, as being presumed to have undergone a more critical examination (*t*). Indeed, an exemplification under the Great Seal is itself considered a record of the greatest validity (*u*).

§ 1134. An *office copy* of a record, by which is meant a copy authenticated by a person intrusted for that purpose, which is admitted in evidence upon the credit of the officer, without proof that it has been actually examined, is regarded as equivalent to the record itself, where it is tendered as evidence in the *same court*, and in the *same cause*; but, at common law, such copy must be proved to be correct, if it be produced, either in another court, or even in the same court in another cause (*x*). Whether an issue out of Chancery should be considered as a proceeding in that court, so that, on the trial at Nisi Prius, office copies of former Chancery records in the same cause may be admissible in evidence, is a question on which the authorities are diametrically opposed (*y*); but there seems to be no doubt, but, that on the trial of a cause issuing out of any of the common-law courts, the judge at Nisi Prius will be considered to all intents as acting

(*q*) B. N. P. 226 (b); *Hewson v. Brown*, 2 Burr. 1034. The primary evidence of a Civil Bill Decree in Ireland, is the decree itself signed by the assistant barrister; the Clerk of the Peace's book is good secondary evidence. *Alcorn v. Larkin*, Arm. Mac. & Og. 367; *Donagh v. Bergin*, id. 284. (*s*) Ante, § 6.

(*t*) B. N. P. 226 (b), 228.

(*u*) Id.

(*x*) *Den v. Fulford*, 2 Burr. 1179, per Lord Mansfield; *Jack v. Kiernan*, 2 Jebb & Sym. Q. B. Ir. 231, 237, 238, per Bushe, C. J.; *Barron v. Daniel*, Cr. & Dix, Abr. Cas. 283, per Doherty, C. J.

(*y*) The negative of this proposition was held by Best, C. J., in *Burnand v. Nerot*, 1 C. & P. 578; the affirmative by Littledale, J., in *Highfield v. Peake*, M. & M. 109.

under the authority of that court, and consequently will be bound to receive all office copies, which would be admissible in the cause before the court above (z). So strictly has the *general rule rejecting office copies, excepting in the same cause and court*, been enforced, that where an action was brought in the Queen's Bench against a sheriff for a false return to a writ of fieri facias, the Court would not allow the plaintiff to put in office copies of the writ and return, though the original cause was in that court (a). Where, however, an office copy of an affidavit was admitted, under a judge's order, to be a *true copy*, it was allowed to be used against the party making the admission (b). It is true that several cases may be cited, in which the Courts appear, at first sight, to have relaxed the above rule in favour of office copies of affidavits filed of record (c), and of answers in Chancery (d); but, on narrowly examining these authorities, it will be found, that the distinction between office and examined copies was not taken, and that the real point disputed in each of the cases was, whether any copy was admissible in lieu of the original.

§ 1135. The rule that office copies are inadmissible, excepting in the court and cause to which the record appertains, applies only to such copies as are made by an officer having no other authority to make them than a rule of court established for the convenience of suitors; for, *if the officer is bound*, either at common law, or by statute, *to furnish copies*, they will generally be *admitted* in all courts alike (e). For instance, a chirograph, which is an office copy of a fine, is admissible as evidence of a fine in all courts, because it was the duty of the officer to deliver such copies to the parties whose titles were concerned (f); but if it were necessary

(z) *Jack v. Kiernan*, 2 Jebb & Symes, 238, per Bushe, C. J.; *R. v. Jolliffe*, 4 T. R. 292, per Buller, J.; *Anon. Arm. Mac. & Og*, 310, per Brady, C. B.

(a) *Pitcher v. King*, 1 C. & Kir. 655, per Lord Denman.

(b) *Davies v. Davies*, 9 C. & P. 252, per Gurney, B.

(c) *Wightwick v. Banks*, Forrester, 153; *Casburn v. Reid*, 2 Moore, 60; *Croke v. Dowling*, B. N. P. 14. This last case is more fully reported in 3 Doug. 75, as *Crook v. Dowling*, and nothing is there said about the copy being an office copy.

(d) *Salter v. Turner*, 2 Camp. 87; *Studdy v. Sanders*, 2 D. & Ry. 347. In this last case reference is made to *Hennell v. Lyon*, 1 B. & A. 182, as a strictly analogous decision, but there an examined copy was produced.

(e) B. N. P. 229; *Black v. Lord Braybrook*, 2 Stark. R. 12—14; *Appleton v. Lord Braybrook*, 6 M. & Sel. 37—39. See 5 & 6 Will. 4, c. 82, § 4.

(f) B. N. P. 229.

to show that the fine had been levied with proclamations, these could not be proved by office copies, because the chirographer was not appointed by the statutes to copy the proclamations (*g*). Again, the rules of the superior common-law courts may be proved in any court by the production of an office copy, for such copies are given out by the officer in the usual course of his business (*h*). So, a document delivered out by the registrar of the Court of Chancery, as an order of that court, need not be compared with any book of the orders of the court, but will be regarded in the light of an original (*i*).

§ 1186. Among other examples of *office copies* of the records of the superior courts, which, *by statute*, are *rendered admissible* in all courts, may be mentioned, the *certificates of acknowledgment of deeds by married women*, which are filed of record in the Court of Common Pleas, and copies of which, purporting to be signed by the officer with whom they are lodged, are receivable as evidence of the acknowledgments to which they respectively relate (*k*); and the orders and decisions of the Court of Common Pleas, sitting as a Court of Appeal from the decisions of revising barristers, which may be proved by copies purporting to be signed by one of the Masters of the court (*l*). It may here be observed, that, although, in Ireland, the officers of the superior courts are authorised, if not required, by statute (*m*), to furnish office copies of the proceedings

(*g*) B. N. P. 229, 230; Doe v. Bluck, 6 Taunt. 485.

(*h*) Selby v. Harris, 1 Lord Raym. 745; Duncan v. Scott, 1 Camp. 102, per Lord Ellenborough; Jack v. Kiernan, 2 Jebb & Sym. 233, per Perrin, J. As to the mode of proving the general rules of inferior courts, see post, § 1160.

(*i*) Mayor of Ludlow v. Charlton, 9 C. & P. 242, 246, 247, per Gurney, B.

(*k*) 3 & 4 Will. 4, c. 74, § 88; 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(*l*) 6 & 7 Vict. c. 18, after providing by § 66, that the judgment of the Common Pleas on the decisions of revising barristers shall be final "in the case upon the point of law adjudicated upon, and shall be binding upon every Committee of the House of Commons appointed for the trial of every election petition," enacts in § 68, "that a copy of any order or decision of the said Court, such copy purporting to be signed by one of the Masters of the said Court, shall be sufficient evidence in all cases, without proof of the signature of the said Master, and shall have the like force and effect as any entry made in any list or register of voters," either under that Act, or under the Act of 2 & 3 Will. 4, c. 45.

(*m*) See 7 & 8 Vict. c. 107, § 11, and Schedules. See also for the former law, 1 & 2 Geo. 4, c. 53, §§ 24, 25.

of such courts, these copies seem not to be admissible in evidence, excepting in the same cause and the same court; the judges apparently considering, that the Legislature did not, by passing these Acts, intend to effect such an innovation in the law of evidence, as would be introduced, if office copies of all the records of the superior courts were rendered universally admissible (*n*).

§ 1137. The most usual mode of proving records is by an *examined copy*; and when this course is intended to be adopted, a witness must be produced, who will swear that he has compared the copy tendered in evidence with the original, or with what the officer of the court, or any other person read, as the contents of the record, and that such copy is correct (*o*). It is not necessary for the persons examining to exchange papers, and read them alternately both ways (*p*); but it is necessary that the copy should be an accurate and complete copy, and therefore if it contains abbreviations where, in the original, words were written at length, it cannot be received (*q*). Moreover, it must appear that the record, from which the copy was taken, was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept. And this cannot be shown from any light reflected from the record itself, which may have been improperly placed where it was found (*r*).

§ 1138. The records or judicial proceedings of the Admiralty (*s*) and Ecclesiastical Courts (*t*), of the Court of Stannaries (*u*), and of the Courts of Quarter Sessions (*v*), may be proved like those of the superior courts at Westminster, either by producing the originals, or by means of exemplifications, whether under

(*n*) *Jack v. Kiernan*, 2 Jebb & Sym. 231.

(*o*) *Reid v. Margison*, 1 Camp. 469; *Gyles v. Hill*, id. 471, n.; *M'Neil v. Perchard*, 1 Esp. 264; *Fyson v. Kemp*, 6 C. & P. 71; *Rolf v. Dart*, 2 Taunt. 51; *R. v. M'Donald*, Arm. Mac. & Og., 112, per Crampton, J.; *R. v. Hughes*, Cr. & Dix, Cir. R. 13, per Doherty, C. J. *Hill v. Packard*, 5 Wend. 387; *Lynde v. Judd*, 3 Day, 499.

(*p*) Cases cited in last note.

(*q*) *R. v. Christian*, C. & Marsh. 388.

(*r*) *Adamthwaite v. Synge*, 1 Stark. R. 183, per Lord Ellenborough; 4 Camp. 372, S. C.

(*s*) See 3 & 4 Vict. c. 65.

(*t*) See 6 & 7 Vict. c. 38, § 14.

(*u*) See 6 & 7 Will. 4, c. 106, §§ 19, 21.

(*v*) As to the mode of proving civil bill decrees in Ireland, see ante, § 1132, n. (*q*).

the Great Seal, or under the seals of the respective courts, which seals require no proof (y), or by office copies in the same cause and the same court (z), or by examined copies in any court (a). Indeed, these modes of proof are generally available with respect to the judgments or other proceedings of all inferior courts of record (b); and even where the court is not one of record, and where short notes of its proceedings are alone kept, these notes, being considered as public documents, may be proved by examined copies (c). We may add that, where the existence of a record or judgment of any of the inferior common-law courts is put in issue in some cause in the Court of Queen's Bench, the party who has to produce the document questioned, may, instead of applying to the Court of Chancery, as he must have done had the record belonged to the Common Pleas or the Exchequer (d), move the Court of Queen's Bench for a certiorari; and on the issuing of this writ, a literal transcript of the document, under the seal of the inferior court, will be returned directly into the Queen's Bench, and will be sufficient to countervail the plea denying the existence of the original (e).

§ 1139. In extending to all the records and other judicial proceedings of all inferior courts the above common-law modes of proof, it must not be forgotten that, in a few instances, special *statutes* have been passed with the view of *facilitating the proof*, either of the records or other proceedings of *particular tribunals*, or of *particular records and documents*. These Acts, however, by rendering admissible a convenient species of evidence, do not thereby deprive parties of the right of having recourse to any other mode of proof allowable at common law; or, in other words, the *statutable methods of proof are cumulative*, and *not substitutory*; since it is a doctrine, founded on common sense, largely sanctioned by authority, and especially applicable where the common law is concerned, that unless the enactment of a new

(y) Ante, § 6.

(z) Ante, § 1134.

(a) R. v. Hains, Comb. 337, per Holt, C. J.

(b) Id.

(c) Id.

(d) Ante, § 1132.

(e) Woodcraft v. Kinaston, 2 Atk. 317, 318, per Lord Hardwicke; Butcher's case, Cro. Eliz. 821.

provision clearly indicates an intention by the Legislature to abrogate the old, both shall be understood to stand together, unless their so doing would be obviously impossible or absurd(e).

§ 1140. Subject to these observations, we will now refer to the Acts in question; and first, as to those which relate to the proof of the proceedings of *courts of bankruptcy*. The main law on this subject is contained in the statute 2 & 3 Will. 4, c. 114, which, after enacting that certain commissions and other proceedings in bankruptcy may be entered of record (f), and that no fiat where-ever prosecuted, or adjudication of bankruptcy, or appointment of assignees, or certificate of conformity shall be received in evidence, unless it has been first entered of record in the Court of Bankruptcy (g), provides, that "upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a *copy* of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid, without any further proof thereof" (h). The Act further provides, with respect to commissions of bankruptcy, whether issued before or after the 1st of September, 1825 (i), and all proceedings relating thereto, which have been entered of record upon or since that day;—and also with respect to fiats and proceedings under the same, which have been entered of record before the 15th of August, 1832 (j);—that, upon the production of any of these documents with a certificate of such entry thereon, purporting to be signed by the person appointed to enter proceedings in bankruptcy, or by his deputy, the certificate shall be received as evidence of the document

(e) *Escott v. Mastin*, 4 Moore Pr. C. R. 130, 131, per Lord Brougham; *Northam v. Latouche*, 4 C. & P. 140, per Tindal, C. J.; *R. v. Carter*, 1 Den. C. C. 65; *Edwards v. Buchanan*, 3 B. & Ad. 788.

(f) 2 & 3 Will. 4, c. 114, §§ 2, 4, 5.

(g) § 8.

(h) § 9. For the former law, see 6 Geo. 4, c. 16, §§ 96, 97.

(i) When 6 Geo. 4, c. 16, came into operation.

(j) When 2 & 3 Will. 4, c. 114, passed.

having been duly entered of record (*j*). In order that any *certificate of conformity*, granted since the 12th of August, 1842, may discharge the bankrupt from all demands proveable under the fiat, the court authorised to act in the prosecution of the fiat must, *in writing under hand and seal*, certify to the Vice-Chancellor who now discharges the functions of the Court of Review (*k*), that the bankrupt has made a full discovery of his estate and effects, and in all things conformed to the laws relating to bankrupts, and that there does not appear any reason to doubt the truth or fulness of such discovery; and the allowance of the certificate must then be confirmed by the said Vice-Chancellor; after which, the certificate so signed and confirmed, will, on production, be sufficient evidence of the trading, bankruptcy, fiat, and other proceedings precedent to the obtaining the certificate (*l*). With respect to *warrants* and *summonses* issued by courts of bankruptcy, the former must be under the hand and seal, the latter must be in writing under the hand, of a commissioner (*m*); but as these would probably be regarded as public documents, it would seem to be unnecessary to prove the signature or seal in the one case, or the signature in the other (*n*).

§ 1141. The records, orders, and proceedings of the *Insolvent Debtors' Court* may be proved by certified copies, purporting to be signed by the officer in whose custody the same shall be, or his deputy, and to be sealed with the seal of the court. The Act of 1 & 2 Vict. c. 110, which in § 105, contains the above general provision (*o*), has occasioned some litigation by enacting in § 46 (*p*), that a copy of any vesting order, or of any appointment

(*j*) 2 & 3 Will. 4, c. 114, §§ 3, 9, cited ante, § 6. Compare 6 Geo. 4, c. 16, § 96. (*k*) 10 & 11 Vict. c. 102, §§ 1, 2.

(*l*) 5 & 6 Vict. c. 122, §§ 37, 38, 42.

(*m*) 5 & 6 Vict. c. 122, § 79.

(*n*) 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(*o*) 1 & 2 Vict. c. 110, § 105, enacts, "that a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the said court, shall at all times be admitted in all courts and places whatsoever as sufficient evidence of the same, without any other proof whatever given of the same." See, for the former law, 7 Geo. 4, c. 57, § 76, cited ante, § 6.

(*p*) See corresponding § 19, of 7 Geo. 4, c. 57, cited ante, § 6.

of assignees, "such copy being *made upon parchment*, and purporting to have the certificate of the provisional assignee of the said court, or his deputy *appointed for that purpose*, endorsed thereon, and to be sealed with the seal of the said court," shall be received as sufficient evidence of such order and appointment respectively having been made, and of the title of the provisional assignee, and of the other assignees respectively, under the same. This language raised two questions, first, whether a certified copy on *paper* of a vesting order could be received; and, secondly, whether in the event of its being signed by a deputy, his appointment for the particular purpose of making out copies, must either be stated on the document, or proved in evidence. The Court, by determining that a paper copy is admissible (*q*), and that the *special* appointment of a deputy need neither be stated nor proved (*r*), apparently consider that the 46th section is rendered nugatory by the 105th (*s*). It may here be observed, that in some cases, persons who are not traders, and traders who owe less than 800*l.*, may now petition either the Insolvent Debtors' Court or the new County Courts for protection from process, and these petitions, and all proceedings relating thereto, may be proved by producing either the originals purporting to be signed by the commissioner or judge of such respective courts, or copies of them purporting to be so signed (*t*).

§ 1142. A simple mode of proving the records and proceedings of the *new County Courts*, is established by the statute 9 & 10 Vict. c. 95, which, in § 111 enacts, "that the clerk of every court holden under this Act, shall cause a note of all complaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and

(*q*) *Hounsfield v. Drury*, 11 A. & E. 98.

(*r*) *Jackson v. Thompson*, 2 Q. B. 887, 894.

(*s*) As to the mode of proving the general rules of the Insolvent Debtors' Court, see post, § 1160.

(*t*) 10 & 11 Vict. c. 102, §§ 4, 6; 7 & 8 Vict. c. 96, § 37. Before this last Act passed, it was necessary to prove the handwriting of the commissioner to the final order for protection. See 5 & 6 Vict. c. 116, § 10.

such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding, without any further proof" (s).

§ 1143. Among the particular judicial documents, the proof of which is facilitated by statute, may be mentioned convictions for any offences against the Factory Acts (t), or the Act regulating labour in print-works (u), which must be filed amongst the records of the Quarter Sessions, and copies of which, certified under the hand of the Clerk of the Peace, are receivable in evidence upon any future proceedings under those respective Acts (x). So, the verdicts and judgments in compensation cases under the Lands Clauses Consolidation Act, must be signed by the sheriffs, and deposited with the records of the Quarter Sessions; and the same or copies thereof, signed and certified to be true copies by the Clerk of the Peace, are good evidence in all courts and elsewhere (y). So, *examinations* or *depositions* taken by virtue of the English Act, 1 Will. 4, c. 22, or the Irish Act, 3 & 4 Vict. c. 105, may be read in evidence, saving all just exceptions, if purporting to be certified under the hand of the Commissioners, Master, Prothonotary, or other person taking the same (z), and if it further appears to the satisfaction of the judge, that the examinant or deponent is beyond the jurisdiction of the court, or dead, or incapable from permanent sickness or other permanent infirmity to attend the trial (a).

§ 1144. The usual modes of authenticating the records and judicial proceedings of *foreign and colonial courts*, including those of Scotland, and Ireland (b), are either by exemplifications under

(s) See ante, § 1141, ad fin.

(t) 3 & 4 Will. 4, c. 103; 7 & 8 Vict. c. 15.

(u) 8 & 9 Vict. c. 29.

(x) 7 & 8 Vict. c. 15, §§ 67, 68; 8 & 9 Vict. c. 29, §§ 49, 50.

(y) 8 & 9 Vict. c. 18, § 50.

(z) 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(a) 1 Will. 4, c. 22, § 10; 3 & 4 Vict. c. 105, § 75, ante, § 367.

(b) *Adamthwaite v. Synge*, 1 Stark. R. 183; 4 Camp. 372, S. C.

the seal of the court (*d*), or at least under the Great Seal of the state or colony (*e*), which seals must, it seems, be respectively proved (*f*), or by examined copies (*g*). Office copies, or copies certified under the hand of an officer of the court, or even of the judge himself (*h*), cannot in general be received, although such copies be admissible in the foreign or colonial courts (*i*), and although the certificate be duly authenticated by a notary public, whose acts are further certified by the minister of the foreign crown, or the governor of the colony, under the Great Seal, to be entitled to credit (*k*). Neither will an office copy be admissible, on the ground that the court has no seal, or one which is worn so smooth as to make no impression (*l*). In the former case, however, a copy proved to be signed by the judge will, perhaps, be received, if it be distinctly shown that the court has no seal, and that its records are always verified by the judge's signature (*m*); but in the latter, the seal must be affixed and proved, or the copy must be shown to have been duly examined (*n*). If the foreign document, sought to be proved by a copy, be not obviously a record, evidence must be given that it is a public writing deposited

(*d*) *Hughes v. Cornelius*, cited by Lord Holt in *Green v. Weller*, 2 Lord Raym. 893; *Appleton v. Lord Braybrook*, 6 M. & Sel. 36, per Lord Ellenborough.

(*e*) *Anon.*, 9 Mod. R. 68.

(*f*) *Henry v. Adey*, 3 East, 221; *Buchanan v. Rucker*, 1 Camp. 63; 9 East, 192, S. C.; *Alivon v. Furnival*, 1 C. M. & R. 281, 282; ante, § 10. As to the mode of authenticating an affidavit that has been sworn before a foreign court, see *Howzelle v. Watson*, 9 Ir. Law R. 40.

(*g*) *Appleton v. Lord Braybrook*, 6 M. & Sel. 36, per Lord Ellenborough; *Alivon v. Furnival*, 1 C. M. & R. 281; *Adamthwaite v. Synge*, 1 Stark. R. 183; 4 Camp. 372, S. C.; *Furnell v. Stackpoole*, Milw. Eccl. Ir. R. temp. Radcliffe, 281—283.

(*h*) *Henry v. Adey*, 3 East, 221.

(*i*) *Appleton v. Lord Braybrook*, 2 Stark. R. 6; 6 M. & Sel. 34, S. C. See *Brown v. Thornton*, 6 A. & E. 185.

(*k*) *Appleton v. Lord Braybrook*, 2 Stark. R. 6; 6 M. & Sel. 34, S. C.; *Black v. Lord Braybrook*, 2 Stark. R. 7; 6 M. & Sel. 39, S. C.; *Henry v. Adey*, 3 East, 321; *Cavan v. Stewart*, 1 Stark. R. 525; *Flindt v. Atkins*, 3 Camp. 215, n.

(*l*) *Cavan v. Stewart*, 1 Stark. R. 525; *Black v. Lord Braybrook*, 2 Stark. R. 11, per Lord Ellenborough; *Gardere v. Columbian Ins. Co.*, 7 Johns. 514; *Packard v. Hill*, 7 Cowen, 434.

(*m*) *Alves v. Bunbury*, 4 Camp. 28, per Lord Ellenborough. Sed qu.

(*n*) *Cavan v. Stewart*, 1 Stark. R. 525, per Lord Ellenborough; *Appleton v. Lord Braybrook*, 6 M. & Sel. 36, per id.

in some registry or place, whence, by the law or the established usage of the country, it cannot be removed (*o*).

§ 1145. With respect to some particular foreign documents the Legislature has interposed a special mode of proof. For instance, the Acts which authorise the apprehension and committal of certain offenders, who have escaped into this country from the colonies, or from France, or America, enact, that copies of the depositions upon which the original warrant was granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies, may be received in evidence of the criminality of the person apprehended (*p*); but under the Act relating to colonial offenders, no person may endorse the colonial warrant, for the purpose of authorising the apprehension of any one, until the seal or signature, and official character of the party issuing it, have been proved to him upon oath or affidavit (*q*). So, the Act of 45 Geo. 3, c. 92, which was passed to amend the Acts of 13 Geo. 3, c. 31, and 44 Geo. 3, c. 92, for the more easy apprehending and bringing to trial offenders, escaping from one part of the United Kingdom to another, and from one county to another, and which enforces the attendance of witnesses in criminal prosecutions, who reside in one part of the kingdom, on subpœnas requiring their appearance in another;—provides in § 6, that, whenever any warrant or certificate shall, by virtue of any of these Acts, be required to be acted upon in any part of the United Kingdom, other than that in which the same was originally issued, no court, judge, or justice, shall proceed to enforce or act upon the same, until it shall be proved upon oath, that the seal, signet, and signature, upon the same, belong respectively to the court, judge, or justice, whose seal, signet, or signature they purport to be. It may be questionable, whether, since the passing of the Documentary Evidence Act, this proof would be required as between England and Ireland (*r*); but, as that Act does not extend to Scotland (*s*), all warrants and certificates,

(*o*) *Alivon v. Furnival*, 1 C. M. & R. 277, 291, 292; *Furnell v. Stackpoole*, Milw. Eccl. Ir. R. temp. Radcliffe, 283—286.

(*p*) 6 & 7 Vict. c. 34, § 4; id. c. 75, § 2; id. c. 76, § 2.

(*q*) 6 & 7 Vict. c. 34, § 9. See also, 6 & 7 Vict. c. 75, § 3.

(*r*) 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(*s*) Id. § 5.

purporting to be sent from that part of the United Kingdom to any other part, must still be proved in the manner pointed out by the statute of Geo. 3. So, depositions taken under a writ of mandamus from the Queen's Bench, either in India, respecting misdemeanors committed in that country, or in any place belonging to Her Majesty out of the United Kingdom, respecting offences against the Acts for the abolition of the slave trade, may be read as evidence in the Queen's Bench, on the trial of any indictment or information for these respective crimes, if they have been duly taken, and have also been returned to the Queen's Bench closed up and under the seal of two of the judges of the foreign court (t).

§ 1146. Before any document, whether an original or copy, can be received in evidence of a judicial proceeding, it must in general appear that the record or entry of such proceeding has been *finally completed*. For instance, in order to prove the finding of an indictment, either at the Assizes or Sessions, it will not be sufficient to produce the indictment itself endorsed a true bill, or the minute-book of the Clerk of the Peace, or other officer of the court, in which that fact is entered; but the record must be formally drawn up, and proved in the regular way (u). So, a judgment, whether interlocutory or final, of one of the superior courts, cannot be proved by producing the minutes, from which it is to be made up, or even the judgment paper or roll, in which the incipitur has been entered by the Master; for such incipitur is merely the instruction for the future judgment, and the judgment is no record till it is actually made up (x). So, a verdict cannot, in general, be proved by putting in the Nisi Prius record with the *postea* endorsed, but a copy of the judgment rendered upon it must be produced; for it may be that the judgment was arrested, or that a new trial was

(t) 13 Geo. 3, c. 63, § 40; 6 & 7 Vict. c. 98, § 4; ante, §§ 359—362. Qu. how far necessary to prove that they have been duly taken and returned?

(u) *R. v. Smith*, 8 B. & C. 341; *Porter v. Cooper*, 6 C. & P. 354; *Cooke v. Maxwell*, 2 Stark. R. 183; *R. v. Thring*, 5 C. & P. 507.

(x) *Godefroy v. Jay*, 3 C. & P. 192; *R. v. Bellamy*, Ry. & M. 171; *Lee v. Meecock*, 5 Esp. 177; B. N. P. 228; *R. v. Birch*, 3 Q. B. 431, per Lord Denman; *Ayrey v. Davenport*, 2 New R. 474; *R. v. Robinson*, 1 Cr. & Dix, Cir. C. 329. See *Fisher v. Dudding*, 9 Dowl. 872.

granted (y). It is said, that this rule does not apply to issues out of Chancery or out of the Court of Admiralty (z), because in these cases it is not usual to enter up judgment; but still we apprehend, that, in addition to the record of the issue and of the verdict therein, the decree should be proved, in order to show that the verdict was satisfactory to the court granting the issue (a). If the record itself be produced from the proper custody, it seems that no objection can be taken to it, on the ground that it has not yet been filed (b).

§ 1147. In stating that the formal record must generally be proved, it is not meant, as has sometimes been imagined (c), that the record *must* be enrolled *at full length on parchment*. It is true, that in the superior courts this practice has long been established, but in several other courts a more simple, or, it may be, a more slovenly method of making up records, and entering proceedings, prevails. Thus, in the House of Lords itself, the minutes of a judgment on the Journals constitute the judgment itself, and a judgment of that high court may, consequently, be proved, either by an examined copy of the minute (d), or by producing a copy of the Journal in which it is entered, purporting to be printed by the authorised printer (e). So, the orders of Quarter Sessions respecting the removal of paupers, may be proved by the paper book, in which the proceedings of the court have been entered by the Clerk of the Peace, or by a copy of it, provided the minutes sufficiently disclose the jurisdiction of the court, and it be shown that, in practice, no other record of a more formal character is kept (f). If, however, this last fact be not proved, or if the

(y) B. N. P. 234; *Pitton v. Walter*, 1 Stra. 162; *Lee v. Gansel*, 1 Cowp. 3, per Lord Mansfield; *Fitch v. Smallbrook*, Sir T. Raym. 32; *Fisher v. Kitchingman*, Willes, 367; *Gillespie v. Cumming*, Long. & Town. Ex. Ir. R. 181; *Jameson v. Leitch*, Milw. Eccl. Ir. R. temp. Radcliffe, 688, 689; *Holt v. Miers*, 9 C. & P. 196. This rule seems to have been relaxed in two *Nisi Prius* cases, *Foster v. Compton*, 2 Stark. R. 364; and *Garland v. Scoones*, 2 Esp. 648. Sed qu. See post, § 1148, as to some exceptions to the rule. (z) 3 & 4 Vict. c. 65, §§ 11—16.

(a) B. N. P. 234.

(b) *R. v. Shaw*, R. & R. 526.

(c) See 3 Bl. Com. 24; Co. Lit. 260 (a).

(d) *Jones v. Randall*, 1 Cowp. 17.

(e) 8 & 9 Vict. c. 113, § 3, cited ante, § 7.

(f) *R. v. Yeoveley*, 8 A. & E. 806.

jurisdiction of the court do not appear in the minutes, as, for instance, if the caption be omitted, neither the book nor the copy can be received (*g*). Again, the proceedings of the ecclesiastical courts may be proved by the minute books in which they are entered, or by copies of such books, if it be shown that in practice they are never reduced into a more formal shape (*h*); and the same rule will prevail with respect to the judgments and other proceedings of courts-baron (*i*), sheriff's courts (*k*), mayor's courts (*l*), and other courts of inferior jurisdiction (*m*). Indeed, with respect to such courts of inferior jurisdiction as are not courts of record, it seems that their judgments may be proved by the officer of the court, or any other competent person, if it appear that, in fact, no entry of them has been made in any official book (*n*). Thus, where a Railway Act, after empowering owners of lands to claim compensation from the company, the amount in case of dispute to be settled by a sheriff's jury, directed that the verdicts and judgments thereon should be deposited with the Clerk of the Peace for the county, among the records, and should be deemed records, the Court held that, on proof of non-compliance with this direction, parol evidence of such a verdict, and of the grounds on which it proceeded, might be given, and the under-sheriff was called for this purpose (*o*).

§ 1148. The rule requiring the record or judicial entry to be formally completed, before either the original or a copy can be admitted in evidence, is subject, as it would seem, to *three exceptions*. First, when the object is to show to any particular court, that some trial has been held or other proceeding has occurred before the same court while sitting under the same commission, a minute of the former proceeding will be admitted in

(*g*) *R. v. Ward*, 6 C. & P. 366, explained in *R. v. Yeoveley*, 8 A. & E. 818, 819.

(*h*) *Houlston v. Smyth*, 2 C. & P. 25; *R. v. Hains*, Comb. 337, per Lord Holt; *Skin. 584*, S. C.

(*i*) *Dawson v. Gregory*, 7 Q. B. 756.

(*k*) *Arundell v. White*, 14 East, 218—220.

(*l*) *Fisher v. Lane*, 2 W. Bl. 834; 3 Wils. 297, S. C.

(*m*) *R. v. Hains*, Comb. 337; *Skin. 584*, S. C.

(*n*) *Dyson v. Wood*, 3 B. & C. 449, 451.

(*o*) *Manning v. East. Cos. Rail. Co.*, 12 M. & W. 237, 243, 249.

lieu of the record, because, in this case, the formal record cannot be presumed to have been yet made up (*o*). Secondly, the same course will be allowed, where, in consequence of some ulterior proceedings in a cause having been taken, the record cannot, at the time when the evidence is required, have been regularly completed. The case of *R. v. Browne* (*p*) will illustrate this exception. That was an indictment for perjury on a trial at Nisi Prius, and in order to prove the trial, the Nisi Prius record was tendered. No postea was indorsed upon it, but merely a minute of the verdict in the handwriting of the associate. An objection being taken to this evidence, the Court admitted it, on proof by the associate that a motion for a new trial was pending, and that until that rule was disposed of, the postea could not be indorsed. Perhaps, however, it was unnecessary to prove this last circumstance; for, thirdly, where the object of the evidence is merely to establish the fact, that a certain judicial proceeding has taken place, as, for instance, that a trial has been had, a verdict given, or a writ issued, without regard to the facts disputed at the trial, found by the jury, or mentioned in the writ, and irrespective of all ulterior proceedings in the cause, it has been held that the record need not be formally drawn up (*q*). Thus, the postea endorsed on the Nisi Prius record will be sufficient evidence of a trial, to let in the testimony of a witness since deceased (*r*), or, perhaps, to support an indictment against him for perjury (*s*); and where the fact that a writ has issued is mere matter of inducement, that fact may be

(*o*) *R. v. Tooke*, 25 How. St. Tr. 446—449; recognised in *R. v. Smith*, 8 B. & C. 343; *R. v. Robinson*, 1 Cr. & Dix, Cir. C. 329; *R. v. Reilly*, 1 Ir. Cir. R. 796, per Doherty, C. J.

(*p*) 3 C. & P. 572; *M. & M.* 315, S. C. In the last report the fact that a new trial had been moved for does not appear.

(*q*) *B. N. P.* 234; *Pitton v. Walter*, 1 Stra. 162; *Fisher v. Kitchingman*, Willes, 367; *Barton v. Dupuy*, 1 Martin, N.S. 442.

(*r*) *Pitton v. Walter*, 1 Stra. 162.

(*s*) *R. v. Browne*, 3 C. & P. 572; *M. & M.* 315, S. C.; *R. v. Coppard*, *M. & M.* 118. See *R. v. Page*, 2 Esp. 649, n.; and *R. v. Gordon*, C. & Marsh. 410, in which case it was held by Lord Denman, that an allegation in an indictment for perjury that judgment was "entered up" in an action, was proved by producing from the judgment office the book in which the inscription was entered. But see *R. v. Thring*, 5 C. & P. 507; and *R. v. Robinson*, 1 Cr. & Dix, Cir. C. 239, where held that on an indictment for perjury in a prosecution, the record of the former trial must be made up.

proved by producing the writ, though it has not been returned, and is, consequently, not a record (*t*).

§ 1149. In proving records, it is sometimes a question of nicety to determine *how much of the proceedings must be given in evidence*; and as the practice in this respect differs widely according to the *object* for which the evidence is tendered, it is difficult to lay down any distinct rule. It may, however, be stated generally, that where the object is merely to prove the existence of the record in question, that fact may be established by producing the document alone; although if the record be relied upon as proof of certain facts stated therein, or adjudicated thereby, all the proceedings which are necessary, either to render valid, or to explain, the particular document, must, in general, be put in evidence. For instance, if a *decree in Chancery* is offered, merely to prove that it was in fact made, here, as in the case of verdicts (*u*), no proof of any other proceeding is required (*x*); but if a party intends to avail himself of a decree, as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must generally prove, not only the decree, but the bill and answer upon which it was founded; because, without such proof, it may be impossible to understand the decree, or to ascertain with certainty what disputed questions have been decided by it (*y*). Where the bill and answer are fully recited in the decree, this reasoning does not apply; and, consequently, it has more than once been held that, in that case, the production of the decree alone will be sufficient (*z*). On one occasion it was strenuously contended, that the depositions referred to in a decree must also be read as part of the record; but the Court ruled otherwise, observing, that it is from the bill and answer only that a court of

(*t*) B. N. P. 234.

(*u*) Ante, § 1148.

(*x*) *Jones v. Randall*, 1 Cowp. 18; B. N. P. 235; *Blower v. Hollis*, 1 Cr. & Mee. 393; 3 Tyr. 356, S. C., where it was held, that an order for an attachment for not paying costs of an equity suit, was alone *prima facie* evidence that a suit had been pending.

(*y*) *Blower v. Hollis*, 1 Cr. & Mee. 396, per Bayley, B.; *Leake v. Marq. of Westmeath*, 2 M. & Rob. 397, per Tindal, C. J.; *Attwood v. Taylor*, 1 M. & Gr. 289, 290, per Lord Abinger.

(*z*) *Wheeler v. Lowth*, Com. Dig. tit. Ev. C. 1; *Wharton Peer.* 12 Cl. & Fin. 301, 302.

equity collects the questions in dispute, and that the sole object of referring to the depositions, is to bring the same facts before a court of appeal, if necessary (a).

§ 1150. Again, a *judgment of the Ecclesiastical Court* cannot be made evidence without producing the libel and answer and the defensive allegations (b); and on the same principle, if there has been an appeal from such judgment, the decree of the court of appeal cannot be admitted, without proving that court to have been duly in possession of the suit, by producing the process of appeal, that is, the transcript of the proceedings sent from the court below (c). The same rules apply to sentences in the Court of Admiralty, and to judgments in courts-baron and other inferior courts (d). Whether an adjudication by the Insolvent Debtors' Court for the discharge of a prisoner, can be received as evidence of his insolvency, without putting in his petition and schedule, is a question on which the authorities differ (e); though, on strict principle, such evidence would seem to be inadmissible.

§ 1151. An answer in Chancery cannot formally be given in evidence without reading the entire bill (f), unless it be shown that the bill is lost or destroyed (g); but this rule is seldom rigidly enforced; for, as the statements in the bill can scarcely be considered in the light of admissions (h), to insist upon their being read would look like an attempt to prejudice the cause; and, therefore, in practice, the reading of the interrogatory part of the bill is alone required, and that only when the answer would be ambiguous without referring to the questions (i).

(a) *Laybourn v. Crisp*, 4 M. & W. 320, 326—328; 8 C. & P. 397, 403—406.

(b) *Leake v. Marq. of Westmeath*, 2 M. & Rob. 394, per Tindal, C. J. This case virtually overrules *Stedman v. Gooch*, 1 Esp. 6, 8.

(c) *Id.*

(d) *Com. Dig. tit. Ev. C. 1.*

(e) In *M'Kee v. Farnam*, 2 Cr. & Dix, Cir. C. 209, Torrens, J., rejected the adjudication; but in *Brennan v. Dillane*, Ir. Cir. R. 853, Ball, J., admitted that document without the petition, though he required the production of the Schedule. This last decision is said to have been followed by Jackson, J., in a later case, *id.*

(f) *Pennell v. Meyer*, 2 M. & Rob. 98; 8 C. & P. 470, S. C.

(g) *Gilb. Ev.* 49, 50; *Rowe v. Brenton*, 8 B. & C. 765.

(h) They are however admissible, at least for some purposes; see *Lord Trimles-town v. Kemmis*, 9 Cl. & Fin. 777, 778; 5 Ir. Law R. 380, 396, S. C.

(i) *Pennell v. Meyer*, 2 M. & Rob. 98, per Tindal, C. J.; 8 C. & P. 470, S. C.

§ 1152. *Depositions in Chancery* also, cannot, in general, be read, without proof of the bill and answer, in order to show that there was a cause depending, as well as who were the parties, and what was the subject-matter in issue; for, if there were no cause depending, the depositions are but voluntary affidavits; and if there were one, the depositions cannot be read, unless the cause was against the same parties or those claiming in privity with them (*j*). Still, the bill and answer, by being so put in, do not become evidence to be submitted to the jury, and the opposite counsel has, consequently, no right to read or refer to them in his address; for the judge only is to look at them, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit (*k*). Moreover, no proof of the bill or answer is necessary, where the deposition is used against the deponent as his own admission, or for the purpose of contradicting him as a witness (*l*). So, if the Court of Chancery has made an order for the reading of the depositions upon the trial of an issue out of that court, then, upon proof of the order, the depositions will be read without antecedent proof of the bill and answer, provided the witnesses cannot be produced (*m*). So, depositions may be read upon proof of the bill alone, if the defendant to the suit is in contempt for not putting in an answer, and has had an opportunity of cross-examining, which he chose to forego (*n*). Where a party relies upon depositions, he must read the interrogatories as well as the answers, unless he can prove that the former are lost or destroyed (*o*), and it seems that he must also read as part of his case the whole depositions, including the cross-interrogatories and answers thereto (*p*).

§ 1153. Similar rules prevail with respect to the proof of

(*j*) *Laybourn v. Crisp*, 4 M. & W. 326, per Lord Abinger; *Blower v. Hollis*, 1 Cr. & Mee. 396, Maule argu.; 2 Ph. Ev. 149; B. N. P. 240; *Nightingal v. Devisme*, 5 Burr. 2594.

(*k*) *Chappell v. Purday*, 14 M. & W. 303.

(*l*) *Highfield v. Peake*, M. & M. 109.

(*m*) *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Corbett v. Corbett*, 1 Ves. & B. 336, 339—341.

(*n*) *Cazenove v. Vaughan*, 1 M. & Sel. 4; *Carrington v. Carnock*, 2 Sim. 567.

(*o*) *Rowe v. Brenton*, 8 B. & C. 765.

(*p*) *Temperley v. Scott*, 5 C. & P. 341, per Tindal, C. J.

depositions taken upon interrogatories *under special commissions*; and here, unless the commission has been issued in England under the Act of 1 Will. 4, c. 22 (*q*), or in Ireland under the Act of 3 & 4 Vict. c. 105 (*r*), it seems that the depositions cannot, in general, be read, without proof of the commission, though, if this be produced, it is not necessary to go further, and to prove the bill and answer, or other judicial proceedings, upon which the commission has been founded (*s*).

§ 1154. So, the return to *inquisitions post mortem*, and other inquisitions, surveys, extents, and the like, cannot *strictly* (*t*) be proved, without reading the commissions on which they depend (*u*); unless in cases of general concernment, when the commission will be regarded as a thing of such public notoriety as not to require proof (*x*).

§ 1155. So, in order to prove an *award*, it is not only necessary to produce and prove the due execution of that instrument, but the submission to reference must also be proved; for otherwise the authority of the arbitrator to decide the question between the parties does not appear (*y*). If the submission be by a written agreement, its execution by all the parties, including the party relying upon it, must be strictly proved (*z*); and that too, though it has been made a rule of court, pursuant to one of its terms (*a*); but if the arbitrator has been appointed by any rule of court, judge's order, or order of *Nisi Prius*, in any action (*b*), then, on proving the award, and producing the rule or order of reference, a sufficient *prima facie* case will be made out; and it will not be necessary to

(*q*) See ante, §§ 367, 1143.

(*r*) Id.

(*s*) *Bayley v. Wylie*, 6 Esp. 85, per Lord Ellenborough. As to examinations, under writs of mandamus, see ante, §§ 359—362, 1145.

(*t*) As to when this rule will be relaxed, see post, § 1158.

(*u*) *Evans v. Taylor*, 7 A. & E. 617; 3 N. & P. 174, S. C.; B. N. P. 228; *Newburgh v. Newburgh*, 3 Bro. P. C. 553; *Hubb. Ev.* 589, 590.

(*x*) *Sir Hugh Smithson's case*, per Lord Hardwicke, cited B. N. P. 228, 229.

(*y*) *Ferrer v. Oven*, 7 B. & C. 427; 1 M. & Ry. 222, S. C.; *Antram v. Chace*, 15 East, 209; *Brazier v. Jones*, 8 B. & C. 124.

(*z*) Cases cited in last note.

(*a*) *Berney v. Read*, 7 Q. B. 79.

(*b*) 3 & 4 Will. 4, c. 42, § 39; 3 & 4 Vict. c. 105, § 63, Ir.

show, by producing the record in the original action, or otherwise, what specific matters were actually referred (c). If the submission contain a power to appoint an umpire, or to enlarge the time for making the award, and such power be acted upon, proof must be given of the instrument by which the umpire was appointed, or the time enlarged; and a mere recital in the award will not be evidence of these facts (d); neither can the appointment be proved by showing that the umpire had undertaken the duties belonging to his office, and had actually signed the award (e).

§ 1156. In the case of *awards by public officers*, a less rigid amount of proof will sometimes be deemed sufficient, and in the absence of evidence of any subsequent usage inconsistent with the award, the maxim, *omnia præsumuntur ritè esse acta*, will be held to apply (f). Thus, where commissioners, named in an inclosure act, and authorised thereby to stop up roads, provided two justices made an order to that effect, published their award, which recited such order, and by which they stopped up a certain public footpath, it was held, that this recital was sufficient *prima facie* evidence of a valid order, on proof of an ineffectual search for the instrument itself, and that the award must be taken to have been rightly made, unless some proof of enjoyment inconsistent with it could be given (g). The principle of this case has been carried much further by the Legislature; for awards made and confirmed by commissioners under several of the more recent General Inclosure Acts (h), are rendered *conclusive* evidence of a compliance with those Acts, and of all necessary notices and consents; and everything specified in such awards are binding and conclusive on all persons (i).

(c) *Gisborne v. Hart*, 5 M. & W. 50; recognised in *Dresser v. Stansfield*, 14 M. & W. 828, per Parke, B.

(d) *Still v. Halford*, 4 Camp. 19, per Lord Ellenborough; *Davis v. Vass*, 15 East, 97.

(e) *Still v. Halford*, 4 Camp. 19.

(f) *R. v. Haslingfield*, 2 M. & Sel. 558; *Doe v. Gore*, 2 M. & W. 321; *Heysham v. Forster*, 5 M. & Ry. 277. As to when such awards may be proved by certified copies, see post, § 1177.

(g) *Manning v. East. Cos. Rail. Co.*, 12 M. & W. 237.

(h) 6 & 7 Will. 4, c. 115; 3 & 4 Vict. c. 31; 8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70.

(i) See 3 & 4 Vict. c. 31, § 1; and 8 & 9 Vict. c. 118, §§ 104, 105, 157.

§ 1157. There are several other Acts, which relieve parties who rely on particular judicial documents, from the necessity of proving the antecedent proceedings, on which the validity of the documents depends. One example has already been given in the case of a bankrupt's certificate (*k*), and another in the case of depositions in bankruptcy (*l*).

§ 1158. In proving *ancient* records, the strict rules of evidence are sometimes relaxed. Thus, a document, purporting by its contents to be an exemplification of a commission issued by Queen Elizabeth, and produced from the proper place of deposit, has been allowed to be read, without any evidence of its being a true copy, though no seal was affixed to it, and the state of the parchment was such as to render it impossible to say, whether the Great Seal had ever been appended (*m*). So, ancient depositions may be read without putting in the interrogatories (*n*), or the bills and answers to which they relate (*o*), or the commissions under which they were taken (*p*), if it be proved that search has been made for these documents, and that they cannot be found; and on the like proof, answers may, it seems, be received in evidence, though the bills be not forthcoming. So, ancient extents, surveys, or returns to inquisitions, which come from the proper custody, and which bear internal evidence of having been taken under due authority, have sometimes been admitted, especially when they were tendered as evidence of reputation, though the commissions on which their legality depended could not be found (*r*). Where, however, such documents contain no internal evidence of authenticity, they cannot be read, unless the commissions be produced from the proper depository (*s*); neither can they then, if there appears to

(*k*) Ante, § 1140.

(*l*) Ante, § 357.

(*m*) *Mayor of Beverley v. Craven*, 2 M. & Rob. 140, per Alderson, B.

(*n*) *Rowe v. Brenton*, 8 B. & C. 765.

(*o*) *Byam v. Booth*, 2 Price, 234, n.

(*p*) *Bayley v. Wylie*, 6 Esp. 85, per Lord Ellenborough.

(*r*) *Rowe v. Brenton*, 8 B. & C. 747—750; 3 M. & Ry. 133, S. C.; *Doe v. Roberts*, 13 M. & W. 520, 531, 533; *Vicar of Kellington v. Trinity College*, 1 Wils. 170; *Alcock v. Cook*, cited 2 Ph. Ev. 149, n. (1); *Anderston v. Magawley*, 3 Bro. P. C. 588; *Gabbett v. Clancy*, 8 Ir. Law R. 299.

(*s*) *Evans v. Taylor*, 7 A. & E. 617; 3 N. & P. 174, S. C.

have been any excess of authority, or any other irregularity in the proceedings, sufficiently serious to render them not only voidable but void (*t*). We need scarcely here add, that, whether a record be ancient or modern, it is allowable, after proof of its loss or destruction, to show its contents, as in the case of any other document, by secondary evidence (*u*).

§ 1159. Before leaving the subject of judicial proceedings, it is necessary to advert to certain documents, which, though emanating from courts of justice, are not records, or such proceedings, as to be capable of being primarily proved by means of copies. First, *writs and warrants*, until they are returned, must be proved by actual production, though after their return, they become matters of record, and are, consequently, proveable by copies (*x*). So, an *order or certificate of a judge*, if not indorsed on a record, cannot it seems be proved by a copy, but the original must be produced, when the courts will judicially notice the signature, if it purport to be that of one of the equity or common-law judges of the superior courts at Westminster (*z*). A judge's order may also be proved by the rule making it a rule of court (*a*).

§ 1160. With respect to the *general rules* and regulations of *inferior courts*, some doubt exists as to the mode of proof. In one case, where it appeared that the Insolvent Debtors' Court had ordered the printing and circulation of its rules for the guidance of its officers, Lord Tenterden admitted one of these printed copies as primary evidence, though the original rules under the seal of the court were kept at the court, and no proof was given that the copy produced had been compared with them (*b*). In another case, however, where an officer of the same court produced what

(*t*) *Vaux Barony*, Min. Ev. 67 ; *Powis Barony*, cited Cruise on Dign. c. 6, § 60; *Leighton v. Leighton*, 1 Stra. 308 ; *Hubb. Ev.* 590. (*u*) Ante, § 312, et seq.

(*x*) B. N. P. 234. If the writ is the gist of the action it must be returned, id. As to inhibitions, citations, monitions, &c., arising out of appeals to the Privy Council from decisions of the Admiralty or Ecclesiastical Courts, see 6 & 7 Vict. c. 38, § 9.

(*z*) 8 & 9 Vict. c. 113, § 2, cited ante, § 7.

(*a*) *Still v. Halford*, 4 Camp. 18, per Lord Ellenborough.

(*b*) *Dance v. Robson*, M. & M. 294.

purported to be a printed copy of the rules of the court, and stated that he obtained them from the clerk of the rules, and that he was in the habit of distributing them as authentic documents, the Court rejected the copy, as the witness could not otherwise vouch for its authenticity, and no evidence was offered that these printed rules had ever been sanctioned by the Court (c).

§ 1161. The mode of proving the *examinations* of prisoners, taken before magistrates or coroners in *criminal cases*, has already been explained (d); and the reader needs only to be reminded here that copies of these documents are not admissible for the Crown as primary evidence, and that some proof of identity will be required. Indeed, the rule demanding evidence of identity applies equally to all cases, where a party is sought to be bound or affected by some statement previously made by him, which has been reduced into writing; and as, with the view of facilitating this proof, defendants in Chancery are, by a rule of court, required to sign their answers (e), so, in criminal cases, it is a usual practice to make the prisoner, if he can write, subscribe his examination (f).

§ 1162. With respect to the *informations* or *depositions* of witnesses, which have been taken by justices or coroners under the Act of 7 Geo. 4, c. 64 (g), and delivered to the officer of the court

(c) *R. v. Koops*, 6 A. & E. 198. In this case, *Dance v. Robson* was not cited.

(d) Ante, §§ 643—645. (e) *R. v. Morris*, 2 Burr. 1189. (f) Ante, § 644.

(g) § 2 enacts, "That the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison, any person arrested for *felony* or on *suspicion of felony*, shall take the examination of such person, and the *information upon oath of those who shall know the facts and circumstances of the case*, and shall put the same, or as much thereof as *shall be material*, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare anything material touching any such felony or suspicion of felony, to appear at the next court of oyer or terminer, or gaol delivery or superior criminal court of a county palatine or great sessions or sessions of the peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall *subscribe* all such examinations, informations, bailments, and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court."

where the trial is to be, these are proveable in the same manner as the examinations of prisoners (*h*); that is, either by calling the justice or coroner who subscribed them, or by proving his signature thereto, and showing by his clerk, or by some person who was present at the inquiry (*i*), that the forms of law have been duly complied with, and that the depositions contain the statements of the particular witnesses named therein. For the purpose of facilitating the proof of this last fact, it is usual, though not necessary (*k*), to call upon the witnesses to sign or mark their respective depositions; and in all cases it should appear that they were read over to the deponents and assented to by them (*l*). One caption at the head

§ 3 enacts, "That every justice of the peace before whom any person shall be taken on a *charge of misdemeanor or suspicion thereof*, shall take the examination of the person charged, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison, or require bail from the person so charged; and in every case of bailment shall certify the bailment in writing; and shall have authority to bind all persons by recognizance to appear to prosecute or give evidence against the party accused, in like manner as in cases of felony; and shall subscribe all examinations, informations, bailments, and recognizances,¹ deliver, or cause the same to be delivered, to the proper officer of the court in which the trial is to be, before or at the opening of the court, in like manner as in cases of felony."

§ 4 enacts, "That every *coroner*, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or goal delivery, or superior criminal court of a county palatine or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall *certify and subscribe* the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court." See also 9 Geo. 4, c. 54, §§ 2—4, Ir., which contain similar provisions, excepting only that § 2 contains a proviso, that no examination taken before the committing justices on a charge of felony, or suspicion of felony, "shall subject the party examined to any prosecution or penalty, or be given in evidence against such party, save on any indictment for having committed wilful and corrupt perjury in such examination." (*h*) See ante, §§ 643—645.

(*i*) *R. v. Wilshaw*, C. & Marsh. 145. (*k*) *R. v. Flemming*, 2 Lea. C. C. 854.

(*l*) *R. v. Plummer*, 1 C. & Kir. 604, per Gurney, B.

¹ Sic.

of the whole body of depositions will suffice (*m*), but the justice or coroner should subscribe each separate information ; for although this will not be absolutely essential, provided all the depositions be written on one sheet of paper, and the signature be attached to the end (*n*), yet if they be written on separate sheets, and there be no distinct proof of their having been pinned or otherwise fastened together at or before the time when the last was signed, those bearing no signature will be rejected (*o*).

§ 1163. Though justices and coroners are required by statute to take down in writing only so much of the evidence as shall be *material*, it is always highly desirable that the written statements should contain a copious and accurate account of all that actually transpired, including the cross-examinations, as well as the examinations in chief of the respective witnesses (*p*) ; for, if this be not the case, the Court, the prosecutor, and the prisoner, are alike kept in the dark, and much time is often wasted in endeavours to throw discredit upon the testimony of witnesses, by showing that they have made statements at the trial which are not to be found in the depositions returned (*q*). Moreover, it frequently happens that facts, which on a preliminary examination appear to be of trifling importance, turn out in the sequel to be extremely material. If a person of weak intellect or a child be examined before the justice or coroner, it is also desirable that the questions and answers touching his capacity to take an oath, should appear on the face of the depositions (*r*).

§ 1164. It now becomes necessary to advert to a striking *distinction* which *is said* to exist between depositions returned by justices and those made by coroners. The former, to be admissible as secondary evidence (*s*) against the prisoner, must have been

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- (*m*) *R. v. Johnson*, 2 C. & Kir. 355, per Alderson, B.
 - (*n*) *R. v. Osborne*, 8 C. & P. 113, per Coleridge, J., and Lord Abinger.
 - (*o*) *R. v. France*, 2 M. & Rob. 207, per Alderson and Parke, Bs.
 - (*p*) *R. v. Potter*, 7 C. & P. 650, n., per Gaselee, J., and Vaughan, B.
 - (*q*) *R. v. Thomas*, 7 C. & P. 817, per Parke, B.; *R. v. Grady*, id. 650, per Lord Denman; *R. v. Smith*, 2 C. & Kir. 207, per id.
 - (*r*) *R. v. Painter*, 2 C. & Kir. 319, per Wilde, C. J.
 - (*s*) See ante, §§ 347—353.

taken in his presence (*t*); and although it would seem from one case (*u*) that the deposition would not be actually rejected on account of its having been written in the absence of the prisoner, provided it had been read over in his presence to the witness, who had assented on oath to its contents, yet this course has frequently been condemned by the judges as extremely unjust (*y*); and indeed it is obvious, that it affords no fair opportunity to the accused of cross-examining the deponents. On the other hand it is alleged, that depositions returned by a *coroner* in pursuance of the statute will be admissible as secondary evidence, though taken *in the absence of the prisoner*. This doctrine appears to rest on two or three decisions of the date of Charles II. (*z*), which are capable of a far more limited interpretation, and even if this were not so, are entitled to little consideration, as having been pronounced at a time when the rules of evidence were little understood;—on dicta thrown out by Lord Kenyon and Mr. Justice Buller in *R. v. Eriswell* (*a*);—on a note of a case said to have been decided by Mr. Baron Hotham (*b*),—and on a recent ruling by Mr. Justice Coleridge (*c*), the soundness of which it would be difficult to establish. The opposite doctrine is ably supported by Messrs. Starkie (*d*), Philipps (*e*), and Russell (*f*), and appears to be so consistent with sound principle as to insure its recognition, should the question be solemnly discussed in modern times (*g*).

§ 1165. The *probate* of a will is a copy of that instrument exemplified under the seal of the Ecclesiastical Court, which copy

(*t*) *R. v. Errington*, 2 Lew. C. C. 142, per Patteson, J.; *R. v. Woodcock*, 1 Lea. C. C. 502, per Eyre, C. B.; *R. v. Dingler*, 2 Lea. C. C. 561; *R. v. Paine*, 1 Salk. 281; 5 Mod. 163, S. C., cited with approbation by Lord Kenyon, in *R. v. Eriswell*, 3 T. R. 723. See also ante, § 343.

(*u*) *R. v. Smith*, R. & R. 339; 2 Stark. R. 208; Holt, N. P. R. 614, S. C.

(*y*) *R. v. Johnson*, 2 C. & Kir. 394, per Platt, B.; *R. v. Forbes*, Holt, N. P. R. 599, n., per Chambre, J. See also *R. v. Crowther*, 1 T. R. 125.

(*z*) *R. v. Morley*, J. Kel. 55; 6 How. St. Tr. 776, S. C.; *Bromwich's case*, 1 Lev. 180; *Thatcher v. Waller*, T. Jones, 53; *R. v. Harrison*, 12 How. St. Tr. 852.

(*a*) 3 T. R. 713, 722.

(*b*) *R. v. Purefoy*, Pea. Ev. 61, n., 5th Ed.

(*c*) *Sills v. Brown*, 9 C. & P. 601.

(*d*) 2 St. Ev. 384—386.

(*e*) 2 Ph. Ev. 74, 75.

(*f*) 2 Russ. C. & M. 892, 893.

(*g*) See *R. v. Wall*, 2 Russ. C. & M. 893, n. (*e*).

is attached to a certificate, stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein (*g*). This document, which constitutes the title-deed of the executor, without which his character cannot be recognised, and with which it cannot be impugned, in any court of law or equity (*h*), may be proved primarily, either by producing the probate itself, when due notice will be taken of the seal (*i*), or by producing from Doctors' Commons the Act-book, containing an entry that the will was proved and probate granted, or even an examined copy of such book (*k*). If, indeed, as is the practice in some of the inferior spiritual courts (*l*), no Act-book, or other separate record of the granting of probates is kept, but on the will itself a memorandum is endorsed, stating that the executor has proved it, and that the probate has passed the seal, then, on proof of such practice, and on production of the will with such endorsement, the title of the executor will be sufficiently established, without accounting for the non-production of the probate (*m*). But, under no other circumstances will the original will be admitted, either by a court of law or equity, as evidence of title to *personal* property (*n*). In the event of the probate being lost or destroyed, it seems that it *may* be proved by an examined copy (*o*); but the practice of the spiritual courts in such case is to grant an exemplification of the entry of the Act-book, in which the grant of probate is recorded (*p*). We may add, that in all proceedings in

(*g*) Toller on Ex. 58.

(*h*) Toller on Ex. 74, 75. As to the jurisdiction of the spiritual court to grant administration in the case of a married woman's will, see *Tucker v. Inman*, 4 M. & Gr. 1049; *Stone v. Forsyth*, 2 Doug. 707.

(*i*) *Kempton v. Cross*, Rep. temp. Hardw. 108; ante, § 6.

(*k*) *Cox v. Allingham*, Jac. Rep. 514. So, the revocation of probate may be proved by the Act-book of the spiritual court; *R. v. Ramsbottom*, 1 Lea. C. C. 25, n. See ante, § 310.

(*l*) For instance, the Bishop's Courts at Winchester, and Wells, 7 A. & E. 240, 243.

(*m*) *Doe v. Mew*, and *Doe v. Gunning*, 7 A. & E. 240; 2 N. & P. 260, S. C. See also *Gorton v. Dyson*, 1 B. & B. 219; 3 B. Moore, 558, S. C.

(*n*) *Pinney v. Pinney*, 8 B. & C. 335; *R. v. Barnes*, 1 Stark. R. 243, per Le Blanc, J.; *Stone v. Forsyth*, 2 Doug. 707.

(*o*) *R. v. Haines*, Skinn. 584, per Lord Holt; *Hoe v. Nelthorpe*, 3 Salk. 154; 1 Lord Raym. 154, S. C., nom. *Hoe v. Nathrop*. If the question relate to realty, neither the probate nor the copy will be admissible.

(*p*) *Shepherd v. Shorthose*, 1 Stra. 412.

the Irish Civil Bill Courts to recover legacies or land, an *examined or attested copy* of the *will* is receivable in evidence instead of the original will or probate (*p*).

§ 1166. The granting *administration*, which, like the granting of probate, is the act of the ecclesiastical courts, may be proved by producing either the letters of administration, under the seal of the court (*q*), or the Act-book containing a record of the grant, or an exemplification or examined copy of such record; and either of these kinds of proof will be admissible as primary evidence (*r*).

§ 1167. The next class of public writings to be considered, consists of *official registers*, or books kept by persons in public office, in which they are required, whether by statute or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examining of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly, because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally, because they are made under the sanction of an oath of office, or, at least, under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses (*s*).

§ 1168. To render any document admissible in evidence as an *official register*, it must be one which the *law requires to be kept for the public benefit*. Thus, a book produced from the office of the Secretary of Bankrupts, in which entries were made of the allowance of certificates, has been rejected, as it was not kept by order of the Lord Chancellor, nor were the entries made by any person

(*p*) 6 & 7 Will. 4., c. 75, § 27. See *Jackson v. Jackson*, Ir. Cir. R. 469.

(*q*) The seal will be judicially noticed, ante, § 6.

(*r*) *Kempton v. Cross*, Rep. temp. Hardw. 108, 109; *Elden v. Keddell*, 8 East, 187; *Davis v. Williams*, 13 East, 232. See ante, § 310.

(*s*) 1 St. Ev. 230.

in the course of his official duty (*t*). In like manner, a register of attendances, kept by the medical officer of a union for the inspection of the guardians, in obedience to a rule of the Poor-law Commissioners, has been held inadmissible; no credit being given to the officer in respect of the entries, but the book being merely intended as a check upon himself (*u*). So, Lord Denman has refused to admit the register of shipping kept at Lloyd's (*v*). So, the registers and records of baptisms and marriages performed at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and in certain other places, are inadmissible, on the ground that they were not compiled under public authority (*w*). So, a Jewish register of circumcision, kept at the great synagogue in London, has been rejected, though it was proved that the entries in it were in the handwriting of a deceased Chief Rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the book (*x*). So the birth, marriage, or burial register of a Wesleyan or other dissenting chapel will be rejected, unless it has been deposited in the office of the Registrar-General, and entered in his list pursuant to the provisions of the Act of 3 & 4 Vict. c. 92 (*y*).

§ 1169. The same rule prevails with respect to *foreign* and *colonial registers*; that is, copies of such registers will only be admissible, on proof that they are required to be kept by the law of the country to which they belong. In the absence of such proof,

(*t*) *Henry v. Leigh*, 3 Camp. 499. (*u*) *Merrick v. Wakley*, 8 A. & E. 170.

(*v*) *Freeman v. Baker*, 5 C. & P. 482. For a description of this book see *Kerr v. Shedden*, 4 C. & P. 531, note (*a*). In *Bain v. Case*, 3 C. & P. 496; and in *Abel v. Potts*, 3 Esp. 242, this book was admitted; in the first-named case, to prove that the coast of Peru was in a state of blockade at a particular time, and in the other, as evidence of the capture of a vessel. See also *Richardson v. Mellish*, 2 Bing. 241, per Best, C. J.

(*w*) *Read v. Passer*, 1 Esp. 213; 1 Pea. R. 303, S. C.; *Doe v. Gatacre*, 8 C. & P. 578. These registers are now deposited in the office of the Registrar-General, pursuant to the Act of 3 & 4 Vict. c. 92, §§ 6, 20, which Act, however, does not render them receivable in evidence.

(*x*) *Davis v. Lloyd*, 1 C. & Kir. 275, per Lord Denman and Patteson, Js. But see observations on this case, ante, § 491.

(*y*) *Whitnack v. Waters*, 4 C. & P. 375; *Newham v. Raithby*, 1 Phillim. 315; *Ex parte Taylor*, 1 J. & W. 483. As to the Act, see ante, § 1109, n. (*d*), post, § 1177, n. (*z*).

a copy of a baptismal register in Guernsey (*z*),—a copy of the marriage register in the Swedish ambassador's chapel at Paris (*a*),—and a copy of the book kept at the British ambassador's hotel in Paris, wherein the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him (*b*),—have been rejected. But on the other hand, an examined copy of a marriage register in Barbadoes has been admitted, it appearing that by the law of that colony such register was kept (*c*). In America, authenticated copies of foreign registers are receivable in evidence (*d*).

§ 1170. It is also deemed essential to the official character of these books, that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they be made by the person, whose duty it was to make them, and in the mode required by law, if any has been prescribed (*e*). Thus, a minister's entry of a baptism, which took place before he had any connection with the parish, and of which he received information from the clerk, is inadmissible; as is also the private memorandum made by the clerk who was present at the ceremony (*f*).

§ 1171. It may here be advisable to *enumerate* some of the books which the *law will recognise as official registers*, or public documents. Of this description are parish registers (*g*); the registers of births, marriages, and deaths, made pursuant to the Registration Act (*h*); the register of marriages in Ireland (*i*); certain non-

(*z*) *Huet v. Le Mesurier*, 1 Cox, 275. On this case Dr. Lushington observes that the evidence was rejected, "because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and that by ancient custom a register was required to be kept there, different considerations might have applied to the case. * * * I am of opinion, that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country." *Coode v. Coode*, 1 Curt. 766.

(*a*) *Leader v. Barry*, 1 Esp. 353.

(*b*) *Athlone Peer.*, 8 Cl. & Fin. 262.

(*c*) *Coode v. Coode*, 1 Curt. 755, 766, 767, per Dr. Lushington.

(*d*) *Kingston v. Lesley*, 10 Serg. & R. 383, 389.

(*e*) *Doe v. Bray*, 8 B. & C. 813; *Walker v. Wingfield*, 18 Ves. 443. (*f*) *Id.*

(*g*) *Doe v. Barnes*, 1 M. & Rob. 386.

(*h*) 6 & 7 Will. 4, c. 86.

(*i*) 7 & 8 Vict. c. 81, §§ 52, 71.

parochial registers deposited in the office of the Registrar-General, by virtue of the Act of 3 & 4 Vict. c. 92 (*k*); the books of baptisms, marriages, and burials in India, deposited at the India-House (*l*); the lists of passengers transmitted by the captains of ships in the India trade to the Court of Directors, in pursuance of an Act of Parliament (*m*); the deposit and transfer books of the East India Company (*n*), and of the Bank of England (*o*); the rolls of Courts Baron (*p*); land-tax assessments (*q*); vestry books (*r*); bishops' registers and chapter-house registers (*s*); terriers (*t*); the books kept at public prisons (*u*); the books of the Master's office (*v*); the log-books and muster-books of Her Majesty's ships, and even official letters lodged at the Admiralty (*x*); lists of convoy (*y*); the books of the Sick and Hurt-office (*z*); poll-books for the election of members of Parliament (*a*); the books which contain the official proceedings of corporations, and matters respecting their property, if the entries are of a public nature (*b*); the books and other official papers kept at the Custom-house (*c*), the Excise (*d*), the Post-office, the Stamp-office (*e*), the Register-offices of merchant seamen (*f*), of joint-stock

(*k*) See ante, § 1109, n. (*d*), as to what these registers consist of; and post, § 1177, n. (*s*), as to the conditions on which they are receivable in evidence.

(*l*) Rep. of 1838, by comm. to inquire into state of non-parochial registers, p. 13.

(*m*) *Richardson v. Mellish*, 2 Bing. 240. See 3 & 4 Will. 4, c. 93, § 3.

(*n*) 2 Doug. 593, n. (3).

(*o*) *Mortimer v. M'Callan*, 6 M. & W. 58.

(*p*) B. N. P. 247; *Doe v. Askew*, 10 East, 520.

(*q*) *Doe v. Seaton*, 2 A. & E. 178, per Patteson, J.; *Doe v. Arkwright*, id. 182, (note), per Lord Denman; *R. v. King*, 2 T. R. 234; *Doe v. Cartwright*, Ry. & M. 62; 1 C. & P. 218, S. C.

(*r*) *R. v. Martin*, 2 Camp. 100.

(*s*) *Arnold v. Bp. of Bath and Wells*, 5 Bing. 316; *Coombs v. Coether*, M. & M. 398; *Humble v. Hunt*, Holt, N. P. R. 601.

(*t*) B. N. P. 248; 1 St. Ev. 239.

(*u*) *Salte v. Thomas*, 3 B. & P. 188; *R. v. Aickles*, 1 Lea. C. C. 391.

(*v*) *Merrick v. Wakley*, 8 A. & E. 172, per Lord Denman.

(*z*) *D'Israeli v. Jowett*, 1 Esp. 427; *Watson v. King*, 4 Camp. 275; *R. v. Fitzgerald*, 1 Lea. C. C. 20; *R. v. Rhodes*, id. 24; *Barber v. Holmes*, 3 Esp. 190. Most of these documents are now lodged at the Record Office. See ante, § 1095.

(*y*) *Richardson v. Mellish*, 2 Bing. 241, per Best, C. J.

(*z*) *Wallace v. Cook*, 5 Esp. 117.

(*a*) *Mead v. Robinson*, Willes, 422; *R. v. Hughes*, cited id.; *R. v. Davis*, 2 Str. 1048; 6 & 7 Vict. c. 18, §§ 93—96.

(*b*) *Marriage v. Lawrence*, 3 B. & A. 142; *R. v. Mothersell*, 1 Stra. 93; *Thetford's case*, 12 Vin. Abr. 90, pl. 16; *Warriner v. Giles*, 2 Stra. 954; id. 1223, note (1).

(*c*) *Johnson v. Ward*, 6 Esp. 48; *Tomkins v. Att.-Gen.*, 1 Dow, 404.

(*d*) *Puller v. Fotch*, Carth. 246; *R. v. Grimwood*, 1 Price, 369.

(*e*) See 7 & 8 Vict. c. 113, §§ 19, 20; 6 & 7 Will. 4, c. 76, § 8, cited post, § 1177, n. (*j*).

(*f*) 7 & 8 Vict. c. 113, § 25; 5 & 6 Will. 4, c. 19, § 19.

companies (*h*), and of copyright (*i*); and in short, the official documents belonging to all other public offices. We shall presently see, when we come to the proof of public documents by examined copies (*k*), or certified copies (*l*), that this list might be much enlarged; but, in order to avoid repetition, no other instances are here given.

§ 1172. The most satisfactory mode of proving official registers and other public documents of a like nature, is by *producing* the *books* or documents themselves, and showing that they came from the proper *repository* (*m*). In some few cases this is the *only legitimate mode of proof*. Thus, the books of companies subject to the provisions of the Companies Clauses Consolidation Act, in which are entered the proceedings of the directors, of the committees of directors, and of the meetings of the company, and each entry in which must purport to be signed by the chairman of the meeting, cannot be proved by copies, however authentic (*n*). Neither can the books of the proceedings of companies, to which the Joint-stock Companies Act applies, be proved by copies, but the books themselves must be produced, when, if the entry sought to be read purports to be signed by the chairman of the meeting, and to be sealed with the seal of the company, it will be received as *prima*

(*h*) 7 & 8 Vict. c. 110, §§ 18, 19.

(*i*) 5 & 6 Vict. c. 45, § 11, cited ante, § 1112, n. (*z*); and 7 & 8 Vict. c. 12, § 8.

(*k*) See post, § 1175.

(*l*) See post, § 1177.

(*m*) *Atkins v. Hatton*, 2 Anst. 387; *Armstrong v. Hewett*, 4 Price, 216; *Pulley v. Hilton*, 12 Price, 625; *Swinerton v. Marq. of Stafford*, 3 Taunt. 91. See ante, § 458, et seq.; and *Croughton v. Blake*, 12 M. & W. 208, as to the repository.

(*n*) 8 & 9 Vict. c. 16, § 98, enacts, that "the directors shall cause notes, minutes, or copies, as the case may require, of all appointments made or contracts entered into by the directors, and of the order and proceedings of all meetings of the company, and of the directors and committees of directors, to be duly entered in books, to be from time to time provided for the purpose, which shall be kept under the superintendence of the directors; and every such entry shall be signed by the chairman of such meeting; and such entry so signed, shall be received as evidence in all courts, and before all judges, justices, and others, without proof of such respective meetings having been duly convened or held, or of the persons making or entering such orders or proceedings being shareholders or directors or members of committee respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last-mentioned matters shall be presumed, until the contrary be proved."

facie evidence (*o*). So, the orders and other documents proceeding from the commissioners of railways, must, as it would appear, be proved by the production of the originals, purporting to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of that body (*p*). So, the awards and other proceedings of the registrar of friendly societies, which are rendered admissible in evidence by the Act of 9 & 10 Vict. c. 27, provided they purport to be executed under the hand of the registrar, must be themselves produced (*q*); and a similar rule applies to the books containing entries of all the orders and proceedings of the commissioners of public baths, which may be read as evidence, if they purport to be signed by any two commissioners (*r*). So, the books of baptisms, marriages, and deaths in India, must, it seems, be

(*o*) 7 & 8 Vict. c. 110, § 32, enacts, "that if the entry of the proceedings of any meeting of the shareholders, or of the directors, of any joint-stock company registered under this Act, purport to be signed by the chairman duly presiding at such meeting, and sealed with the seal of the company, then it shall be the duty of all courts of justice, justices, and others, and they are hereby required, to receive the book in which such entry shall be made, as *prima facie* evidence, not only of the proceedings of the meeting of which entry shall be so made, but of such meetings having been duly convened, and of the persons making or entering such orders or proceedings being shareholders or directors, and of the signature of the chairman."

(*p*) 9 & 10 Vict. c. 105, § 4, enacts, "that the commissioners of railways shall cause a seal to be made for the purposes of their commission, and all orders and other documents proceeding from the said commissioners, and purporting to be sealed or stamped with the seal of the said commissioners, and signed by two or more of the said commissioners, shall be received as evidence of the same respectively in all courts, and before all justices and others, without any further proof thereof."

(*q*) 9 & 10 Vict. c. 27, § 20, enacts, "that every transcript of the rules of any such society purporting to be certified by the registrar of friendly societies in England, Ireland, or Scotland, and every award or other proceeding as aforesaid, purporting to be executed under the hand of the said registrar, shall be receivable in all courts, and before all justices and others, as evidence that such rules have been duly certified or such award made, or such proceeding had, until the contrary shall be made to appear."

(*r*) 9 & 10 Vict. c. 74, § 18, enacts, "that all orders and proceedings of the commissioners shall be entered in books to be kept by them for that purpose, and shall be signed by the commissioners, or any two of them, and all such orders and proceedings so entered and purporting to be so signed, shall be deemed to be original orders and proceedings; and such books may be produced and read as evidence of all such orders and proceedings, upon any appeal, trial, information, or other proceeding, civil or criminal, and in any court of law or equity whatsoever."

brought from the India-House (*s*). So, in criminal proceedings, the non-parochial registers deposited with the Registrar-General, must, in order to be evidence, be produced to the Court (*t*). So, the register of coalwhippers cannot be proved by a copy (*u*); neither, as it would seem, can the daily books of public prisons (*x*).

§ 1173. To the above list might be added several other books and documents of a semi-public nature, which are rendered admissible in evidence by the statute law; but still, as a general rule, this strictness of proof is not required; and indeed, the public inconvenience that would follow the removal of *books of general concernment*, has been felt to be so great, as to justify, and in some cases to compel, the introduction of secondary evidence (*y*). Such books belong to a particular custody, from which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary for the purpose of identifying it, or of determining some question arising upon the original entry, or of correcting an error, which has been duly ascertained. As, therefore, these books are, in general, not removable at the call of individuals, and as, moreover, being interesting to many persons, they might be required as evidence in different places at the same time, it has become an axiom of almost universal application, that *whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy* (*z*). So anxious are the judges not to break in upon this rule, founded as it is on public convenience, that even though the original document

(*s*) Rep. of 1838, by commissioners appointed to inquire into state, &c., of non-parochial registers, p. 13.

(*t*) 3 & 4 Vict. c. 92, § 17, cited post, § 1177, n. (*s*). As to what these registers contain, see ante, § 1109, n. (*d*).

(*u*) 9 & 10 Vict. c. 36, § 13, enacts, "that in all courts, and before any justices of the peace, and upon all occasions whatever, the entries made and contained in the register of coalwhippers shall be received in evidence, and shall be deemed sufficient proof of all matters and things therein registered and contained, without any further proof than the production of such register."

(*x*) *Salte v. Thomas*, 3 B. & P. 190, 191, per Lord Alvanley.

(*y*) *Mortimer v. McCallan*, 6 M. & W. 67, per Lord Abinger.

(*z*) *Lynch v. Clarke*, 3 Salk. 154, per Holt, C. J.; 2 Doug. 593, n. (3); *R. v. Hains*, Comb. 337; *Hoe v. Nathrop*, 1 Lord Raym. 154.

be in court, they will not require its production, but will admit the copy, provided its authenticity be established (*a*).

§ 1174. Now, an examined copy, duly made and sworn to by a competent witness, is almost universally considered as authentic; and although, as we shall presently see (*b*), the legislature has in many cases provided a more simple mode of proof, namely, by the production of a certified copy, this does not, excepting in one or two instances (*c*), preclude the party from having recourse to an examined copy as his medium of proof, however unadvisable it may be to incur the additional expense and risk, which this method of proceeding entails (*d*). It often, too, happens that certified copies are not rendered admissible by any statute; and in these cases, unless the public book or document be itself produced, its contents can only be proved by copies or extracts duly examined with the originals.

§ 1175. Among the public books and documents, of which, in the absence of the originals, *examined copies* thus form the sole medium of proof, may be mentioned the following;—parish registers (*e*); the deposit and transfer-books of the Bank of England (*f*), and of the East India Company (*g*); the books of the Customs, Excise, and Post-office (*h*); the rolls of Courts Baron (*i*); assessments of land-tax (*k*); the books of entry, records, deeds, instruments, writings, maps, plans, and other official papers

(*a*) *Marsh v. Collnett*, 2 Esp. 665, per Lord Kenyon. See § 70, ante, as to an analogous rule, in not requiring a subscribing witness to an *ancient* deed to be called, even though present in court.

(*b*) Post, § 1177.

(*c*) Post, § 1177, n. (*m*).

(*d*) Ante, § 1139.

(*e*) *Doe v. Barnes*, 1 M. & Rob. 386.

(*f*) *Breton v. Cope*, 1 Pea. R. 30; *Marsh v. Collnett*, 2 Esp. 665; *Mortimer v. M'Callan*, 6 M. & W. 58.

(*g*) 2 Doug. 593, n. (3); *Doe v. Roberts*, 13 M. & W. 532, per Parke, B.

(*h*) *Mortimer v. M'Callan*, 6 M. & W. 68, per Lord Abinger; *Fuller v. Fitch*, Carth. 346.

(*i*) B. N. P. 247. Examined copies of court-rolls are admissible, though they are not the copies delivered to the tenant of the estate; *Breeze v. Hawker*, 14 Sim. 350.

(*k*) *R. v. King*, 2 T. R. 234. Those in the Record Office must be proved by certified copies, see ante, § 1129.

deposited in the office of land revenue records and enrolments (*l*) ; perhaps, the Middlesex registry of deeds (*m*) ; the Act-book in the registry of the Prerogative Court of Canterbury (*n*) ; the enrolments of deeds and other instruments in the books of the office of the Duchy of Cornwall (*o*) ; the oaths and declarations of ship-owners relative to their ships, and the books of registries of vessels, kept by the collectors and comptrollers of Her Majesty's customs (*p*) ;

(*l*) *Doe v. Roberts*, 13 M. & W. 520 ; 2 Will. 4, c. 1, §§ 15, et seq. ; 7 & 8 Vict. c. 89.

(*m*) *Collins v. Maule*, 8 C. & P. 502, per Tindal, C. J. ; *Doe v. Kilner*, 2 C. & P. 289.

(*n*) *Davis v. Williams*, 13 East, 232. Entries in this book may also be proved by an exemplification ; ante, § 1165.

(*o*) 7 & 8 Vict. c. 65, § 34, enacts, "that the enrolments in the books of the said office, or an examined copy thereof, shall, in the absence of evidence to the contrary, and without requiring the production or accounting for the non-production of the original deed, certificate, receipt, or instrument, and, without calling any attesting witness thereof, be sufficient proof of such original, and of its having been duly made, granted, given, or executed by the party or parties by whom the same shall purport to have been signed or executed."

(*p*) 8 & 9 Vict. c. 89, § 43. "And whereas great inconvenience hath arisen from the registering officers being served with subpoenas requiring them to bring with them and produce, on trials in courts of law relative to the ownery of vessels, or otherwise, the oaths or declarations required to be taken by the owners thereof prior to the registering thereof, and the books of registry, or copies or extracts therefrom : And whereas it would tend much to the dispatch of business if the attendance of such registering officers with the same upon such trials were dispensed with ; be it therefore enacted, that the collector and comptroller of Her Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit for his, her, or their inspection and examination, any oath or declaration sworn or made by any such owner or owners, proprietor or proprietors, and also any register or entry in any book or books of registry required by this Act to be made or kept relative to any ship or vessel, and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies, or an extract or extracts thereof respectively ; and that the copy and copies of any such oath or declaration, register or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or comptroller, or other person or persons acting for them respectively, in all cases, as fully and to all intents and purposes as such original or originals, if produced by any collector or collectors, comptroller or comptrollers, or other person or persons acting for them, could or might legally be admitted or received in evidence." A similar enactment was contained in an earlier Act for registering British vessels. See 3 & 4 Will. 4, c. 55, § 40.

and the rules of savings-banks, and government annuity societies, deposited with the commissioners for the reduction of the national debt (*q*).

§ 1176. We have before observed (*r*) that, in many cases, a more simple mode of proof than by examined copies is allowed, namely, by the production of a copy certified to be correct by some officer, who is specially appointed by law for that purpose (*s*). We say, "specially appointed," because, in this country, a person is not authorised to furnish certified copies of public books, merely on account of the entries having been made by him, or of the documents being deposited in his custody (*t*); although, in America, the weight of authority has apparently established the salutary rule, that, whenever it is the duty of a public officer to keep the original, a certified copy given by him will be receivable in evidence (*u*). The English law, however, which relates to the proof of certified copies, is so far satisfactory, that if they *purport* to be duly signed or sealed, or otherwise authenticated in the manner pointed out by statute, they will be admitted in evidence, without proof of the seal, the signature, or the official character of the party certifying (*x*).

§ 1177. It may here be convenient to *enumerate* some of the public registers and documents, *certified copies of which will be receivable in evidence*. Among these may be mentioned the registers of births, marriages, and deaths, made pursuant to the Registration Act (*y*); the non-parochial registers of births, baptisms,

(*q*) 7 & 8 Vict. c. 83, § 19. "The copy of such rules deposited with the said commissioners, or a true copy thereof, examined with the original, and proved to be a true copy, shall be received as evidence of such rules respectively in all cases."

(*r*) Ante, § 1174. (*s*) B. N. P. 229. (*t*) Id.; 2 Ph. Ev. 132.

(*u*) U. S. v. Percheman, 7 Peters, 51, 85; Oakes v. Hill, 14 Pick. 442, 448; U. S. v. Johns, 4 Dall. 412, 415.

(*x*) 8 & 9 Vict. c. 113, § 1; cited ante, § 7.

(*y*) 6 & 7 Will. 4, c. 86, § 38, enacts, "that the Registrar-General shall cause to be made a seal of the said register office, and the Registrar-General shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and *all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry;*

marriages, deaths, and burials, which are deposited in the office of the Registrar-General, and certified extracts from which are admissible, under certain regulations as to notice, &c., in all civil proceedings (z), though in criminal cases the original register must

and no certified copy, purporting to be given in the said office, shall be of any force or effect, which is not sealed or stamped as aforesaid." See also §§ 35, 36, cited ante, § 1109, n. (b), which authorise the clergyman, superintendent registrar, and other officers, to give certified copies of the local registers; but as the Act contains no provision for making such copies evidence, quare, whether they would be admissible. It would seem that the *local registers* would themselves be evidence, if produced from the proper custody.

(e) 3 & 4 Vict. c. 92, § 9, enacts, "that the Registrar-General shall certify all extracts which may be granted by him from the registers or records deposited, or to be deposited, in the said office, and made receivable in evidence by virtue of the provisions herein contained, by causing them to be sealed or stamped with the seal of the office; and all extracts purporting to be stamped with the seal of the said office shall be received in evidence in all cases, instead of the production of the original registers or records containing such entries, subject nevertheless to the provisions hereinafter contained."

§ 10 enacts, "that every extract granted by the Registrar-General from any of the said registers or records, shall describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited in the general register office under this Act; and the production of any of the said registers or records from the general register office, in the custody of the proper officer thereof, or the production of any certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office, shall be sufficient to prove that such register or record is one of the registers and records deposited in the general register office under this Act, in all cases in which the register or record, or any certified extract therefrom, is herein respectively declared admissible in evidence."

§ 11 enacts, "that in case any party shall intend to use in evidence on the trial of any cause in any of the *courts of common law*, or on the hearing of any matter which is not a criminal case, at any session of the peace in England or Wales, any extract, certified as hereinbefore mentioned, from any such register or record, he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract, and of the certificate thereof; and on proof by affidavit of the service or on admission of the receipt of such notice and copy, such certified extract shall be received in evidence at such trial or hearing, if the Judge or Court shall be of opinion that such service has been made in sufficient time before such trial or hearing, to have enabled the opposite party to inspect the original register or record, from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided."

§ 12 enacts, "that in case any party shall intend to use in evidence on such trial or hearing any original register or record (instead of such certified extract), he shall nevertheless, within a reasonable time, give to the opposite party notice

be produced (a) ; the register of marriages in Ireland, deposited in the General Register Office, at Dublin (b) ; the poll-books for the

of his intention to use such original register or record in evidence, and deliver to such opposite party a copy of a certified extract of the entry or entries, which he shall intend to use in evidence."

§ 13 enacts, "that in case any party shall intend to use in evidence on any examination of witnesses, or at the hearing of any cause, in any *court of equity*, any extract, certified as hereinbefore mentioned, he shall, ten clear days at the least before publication shall pass in any cause, where no commission has issued for the examination of the witnesses of the party intending to give such evidence, or where such commission shall issue, then seven clear days at the least before the opening of such commission, deliver to the clerk or clerks in court of the opposite party or parties a notice in writing of his intention to use such certified extract in evidence, on the examination of witnesses or at the hearing of a cause (as the case may be), and shall at the same time deliver to the clerk or clerks in court of the opposite party or parties a copy or copies of such extract, and of the certificate thereof, and thereupon such certificated extract shall be received in evidence : Provided that at the hearing of the cause the service of such certified copy and notice be admitted or proved by affidavit."

§ 14 enacts, "that in case any party shall intend to use in evidence, on such examination or hearing in any court of equity, any original register or record (instead of such certificated extract), he shall nevertheless, within the number of days hereinbefore respectively mentioned, deliver to the clerk or clerks in court of the opposite party or parties a notice of his intention to use such original register or record in evidence, together with a copy of a certified extract of the entry or entries which he shall intend to use in evidence."

§ 15 enacts, "that in case any party shall intend to use in evidence, upon any petition, motion, or other interlocutory proceedings in any court of equity or in the Master's office, any extract certified as hereinbefore mentioned, he shall produce to the Court or Master (as the case may be) an extract, certified as hereinbefore mentioned, accompanied by an affidavit stating the deponent's belief that the entry or entries in the original register or record is correct and genuine."

§ 16 enacts, "that in case any party shall intend to use in evidence in any *ecclesiastical court*, or in the High Court of *Admiralty*, any extract, certified as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from the parish register, save and except that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record : Provided always, that the

(a) § 17 enacts, "that, in all criminal cases, in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the Court the original register or record."

(b) 7 & 8 Vict. c. 81, §§ 52, 71. This last section is the same as § 38 of 6 & 7 Will. 4, c. 86, cited above, in n. (y) to this sect., excepting only that it is confined to marriages.

election of members of parliament, deposited with the Clerk of the Crown in Chancery, which may be proved by office copies issued by such clerk or his deputy (c); the returns and deeds kept by the registrar of joint-stock companies, copies or extracts from which, certified under the hand of the registrar or assistant-registrar, and sealed with the seal of office, are receivable in evidence in all courts of law or equity (d); the book kept at the Hall of the Stationers' Company, wherein are registered the proprietorships and assignments of copyright in books, and in dramatic and musical pieces, whether printed or in manuscript, and licenses affecting such copyright (e); the register tickets, papers, and documents recorded in the General Register Office of Merchant Seamen, copies of which, certified by the registrar or his assistant, are admissible in evidence as fully as the originals (f); the rules of friendly societies, transcripts of which, certified under the hand of the registrar, constitute *prima facie* evidence that the rules have been certified (g); the memorials setting forth the firm names, and the names and places of abode of the members and public officers of banking copartnerships (h),—as also those setting forth the firm names, and the names and places of abode of the members and directors of joint-stock banks,—which are respectively kept at the Stamp Office, and which may be proved by copies certified under the hand of one of the commissioners of stamps and taxes, without showing that the person by whom the memorial in question shall purport to be verified, was the manager or one of the directors of the company (i); the declarations delivered

judge of the court, on cause shown by any party to the suit (or of his own motion when the proceedings are *in poenam*), may, after publication, issue a monition for the production at the hearing of the cause of the original register or record containing the entry to which such certified extract relates."

§§ 18 & 19 authorise the making of rules to regulate the practice as to the admission of these registers, but we are not aware that any such rules have been made.

(c) 6 & 7 Vict. c. 18, § 94, enacts, "that office copies, issued by the said Clerk of the Crown or his deputy, of such poll-books shall be taken in evidence in all courts of law, in actions for bribery or personation, or for any other purpose whatsoever." See also §§ 93, 95, 96. (d) 7 & 8 Vict. c. 110, §§ 18, 19.

(e) 5 & 6 Vict. c. 45, § 11, cited *ante*, § 1112, n. (z); and 7 & 8 Vict. c. 12, § 8.

(f) 7 & 8 Vict. c. 112, § 25; 5 & 6 Will. 4, c. 19, § 19.

(g) 9 & 10 Vict. c. 27, § 20, cited *ante*, § 1172, n. (q). (h) 7 Geo. 4, c. 46, §§ 4, 6.

(i) 7 & 8 Vict. c. 113, §§ 19, 20; extended to Scotland and Ireland by 9 & 10 Vict. c. 75.

at the Stamp Office by the printers, publishers, and proprietors of newspapers, pursuant to the Act of 6 & 7 Will. 4, c. 76, which documents are proveable by certified copies under the hand of one of the commissioners of stamps and taxes, or of any officer in whose possession the same shall be (j) ; the orders, minutes of proceedings,

(j) It may here be advisable to set out the words of the Act. § 6 enacts, that the declaration "shall set forth the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also of the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition, and place of abode of every person who is intended to be the printer or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper, who shall be resident out of the United Kingdom, and also of every person resident in the United Kingdom who shall be a proprietor of the same, if the number of such last-mentioned persons (exclusive of the printer and publisher) shall not exceed two, and in case such number shall exceed two, then of such two persons, being such proprietors resident in the United Kingdom, the amount of whose respective proportional shares in the property, or in the profit or loss of such newspaper, shall not be less than the proportional share of any other proprietor thereof resident in the United Kingdom, exclusive of the printer and publisher, and also where the number of such proprietors resident in the United Kingdom shall exceed two, the amount of the proportional shares or interests of such several proprietors whose names shall be specified in such declaration ; and every such declaration shall be made and signed by every person named therein as printer or publisher of the newspaper to which such declaration shall relate, and by such of the said persons named therein as proprietors as shall be resident within the United Kingdom ; and a declaration of the like import shall be made, signed, and delivered in like manner, whenever and so often as any share, interest, or property soever in any newspaper named in any such declaration shall be *assigned*, transferred, divided, or changed by act of the parties, or by operation of law, so that the respective proportional shares or interests of the persons named in any such declaration as proprietors of such newspaper, or either of them, shall respectively become less than the proportional share or interest of any other proprietor thereof, exclusive of the printer and publisher, and also whenever and so often as any printer, publisher, or proprietor named in any such declaration, or the person conducting the actual printing of the newspaper named in any such declaration, shall be changed, or shall change his place of abode, and also whenever and so often as the title of any such newspaper, or the printing office, or the place of publication thereof shall be changed, and also whenever in any case, or on any occasion, or for any purpose, the said commissioners, or any officer of stamp duties authorised in that behalf, shall require such declaration to be made, signed, and delivered, and shall cause notice in writing for that purpose to be served upon any person, or to be left or posted at any place, mentioned in the last preceding declaration delivered as aforesaid as being a printer, publisher, or proprietor of such newspaper, or as being the place of printing or publishing any such news-

and correspondence of the Board of Trade in relation to railways, which may be proved by certified copies, signed by the officer who

paper respectively; and every such declaration shall be made before any one or more of the said commissioners, or before any officer of stamp duties or other person appointed by the said commissioners, either generally or specially in that behalf." * *

§ 8 enacts, that "all such declarations as aforesaid shall be filed and kept in such manner as the commissioners of stamps and taxes shall direct for the safe custody thereof; and *copies thereof certified to be true copies* as by this Act is directed, shall respectively *be admitted in all proceedings, civil and criminal*, and upon every occasion whatsoever, touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, *as conclusive evidence of the truth of all such matters set forth in such declaration* as are hereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question, *against every person who shall have signed such declaration, unless* it shall be proved that previous to such time such person became lunatic, or that previous to the publication in question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners or to such officer as aforesaid, or unless it shall be proved that, previous to such occasion as aforesaid, a new declaration of the same or similar nature respectively, or such as may be required by law, was duly signed and made and delivered as aforesaid respecting the same newspaper, in which the person sought to be affected on such trial did not join; and the said commissioners, or the proper authorised officer by whom any such declaration shall be kept according to the directions of this Act, shall, *upon application in writing made to them or him respectively by any person requiring a copy certified according to this Act of any such declaration as aforesaid*, in order that the same may be produced in any civil or criminal proceeding, deliver such certified copy, or cause the same to be delivered, to the person applying for the same upon payment of the sum of one shilling, and no more; and *in all proceedings and upon all occasions whatsoever a copy of any such declaration, certified to be a true copy under the hand of one of the said commissioners or of any officer in whose possession the same shall be*¹, * * *shall be received in evidence against any and every person named in such declaration as a person making or signing the same, as sufficient proof of such declaration, and that the same was duly signed and made according to this Act, and of the contents thereof*; and every such copy, so produced and certified, shall have the same effect for the purposes of evidence against any and every such person named therein as aforesaid, to all intents whatsoever, as if the original declaration, of which the copy so produced and certified shall purport to be a copy, had been produced in evidence, and been proved to have been duly signed and made by the person appearing by such copy to have signed and made the same as aforesaid; and whenever a certified copy of any such declaration shall have been produced in evidence as aforesaid against

¹ The signature and official character of the officer need not be proved, 8 & 9 Vict. c. 113, § 1; cited ante, § 7.

was appointed for that purpose by the Board (*k*); the minutes of the orders given by any board of guardians or district board, respecting any complaint, claim, or application made to them, which may be proved by a copy purporting to be signed by the chairman of the board, and to be sealed with their seal, and to be countersigned by their clerk (*l*); licences, orders and instruments, granted, made, issued, or authorised by the Commissioners in Lunacy, in pursuance of the Act of 8 & 9 Vict. c. 100, copies of which, purporting to be sealed or stamped with the seal of the Commission, are receivable in evidence (*m*); the awards and orders

any person having signed and made such declaration, *and a newspaper shall afterwards be produced in evidence intituled in the same manner as the newspaper mentioned in such declaration is intituled, and wherein the name of the printer and publisher and the place of printing shall be the same as the name of the printer and publisher and the place of printing mentioned in such declaration, or shall purport to be the same*, whether such title, name, and place printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the *plaintiff, informant, or prosecutor*² in any action, prosecution, or other proceeding, to prove that the newspaper to which such action, prosecution, or other proceeding may relate was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold."

(*k*) 7 & 8 Vict. c. 85, § 23. The powers of the Board are now transferred to the Commissioners of Railways by 9 & 10 Vict. c. 105, and it seems that certified copies of their proceedings, if admissible at all, must be signed by two of the commissioners, and sealed or stamped with their official seal. § 4, cited ante, 1172, n. (*p*).

(*l*) 7 & 8 Vict. c. 101, § 69, enacts, "That every copy of a minute of any order, complaint, claim, application, or authority of any such board of guardians or district board, purporting respectively to be signed by the presiding chairman of such guardians or district board, and to be sealed with their seal, and to be countersigned by their clerk, shall, unless the contrary be shown, be taken to be sufficient proof of the directions respecting such order, complaint, claim, or application having been given as alleged in the copy of such minute, and shall be received in evidence accordingly by and before all courts of justice and all justices, without any proof of the signatures, or of the official characters of the persons signing the same, or of such seal, or of such meeting." This section is not very intelligibly worded, but its substance appears to be as stated in the text.

(*m*) 8 & 9 Vict. c. 100, § 7, enacts, "That all such licences, orders, and

² Qu. as to the case where a defendant, in mitigation of damages, puts in a libel previously published against him by the plaintiff. See *Watts v. Fraser*, 7 A. & E. 223.

made or confirmed by the Inclosure Commissioners for England and Wales, and other instruments proceeding from their board, which may be proved by copies purporting to be sealed with the seal of the board (*n*); the copies of the confirmed awards of the same Commissioners, which are deposited with the clerk of the peace of the county where the lands inclosed are situate, and which are proveable by copies or extracts "signed by the clerk of the peace or his deputy, purporting the same to be a true copy" (*o*); the plans and books of reference deposited by railway companies with the clerks of the peace, which may be proved by copies or extracts certified by them (*p*); all deeds of exchange made by ecclesiastical corporations under the provisions of the Act for facilitating the exchange of lands lying in common fields, and all leases and other instruments made under the Act for enabling incumbents of ecclesiastical benefices to demise their lands on farming leases, which are respectively entered in the proper ecclesiastical registry, and which may be proved by office copies certified under the hand of the registrar or his deputy (*q*); all counterparts of leases and other instruments deposited with the Ecclesiastical Commissioners for England, under the provisions of the Act enabling ecclesiastical corporations to grant leases for long terms, and which are proveable by office copies certified under the seal of the commissioners (*r*);

instruments, or copies thereof, purporting to be sealed or stamped with the seal of the commission, shall be received as evidence of the same respectively, and of the same respectively having been granted, made, issued, or authorised by the commissioners, without any further proof thereof; and no such licence, order, or instrument, or copy thereof, shall be valid, or have any force or effect, unless the same shall be so sealed or stamped as aforesaid." These last words seem to exclude all examined copies. Some few orders and instruments are exempted from the operation of this section, the Act expressly requiring them to be given or signed and sealed by one commissioner or by two commissioners.

(*n*) 8 & 9 Vict. c. 118, § 2.

(*o*) *Id.* § 146. See also, 41 Geo. 3, c. 109, § 35; and 3 & 4 Will. 4, c. 87, §§ 2, 4.

(*p*) 8 & 9 Vict. c. 20, § 10. See post, § 1188, n. (*b*), and text.

(*q*) 4 & 5 Will. 4, c. 30, §§ 10, 11; 5 & 6 Vict. c. 27, § 14.

(*r*) 5 & 6 Vict. c. 108, § 29, enacts, that such office copies "shall, in any action against the lessee, and in all other cases, be admitted and allowed in all courts whatsoever as legal evidence of the contents of such instrument or document, and of the due execution thereof by the parties, who on the face of such office copy shall appear to have executed the same, and in the case of any lease, grant, or confirmation, of the due execution by the lessee of the counterpart thereof."

all agreements and awards confirmed by the Tithe Commissioners, and other instruments proceeding from their board, which are proveable by copies purporting to be sealed or stamped with the seal of the board (*s*); all orders, regulations, awards or other instruments, made or executed by, or by the authority of, the Commissioners for consolidating and adjusting the turnpike trusts of South Wales, which may be proved by copies purporting to be sealed by their official seal (*t*); the order of a general meeting of any company subject to the provisions of the Companies Clauses Consolidation Act, authorising the borrowing of any money, which is proveable by a copy certified to be true by one of the directors or by the secretary (*u*); the books kept at the office of the Registrar of Metropolitan Public Carriages, wherein are entered the particulars of the licences granted to drivers, conductors, and watermen, and entries in which may be proved by copies purporting to be certified by the person having the charge of the books (*v*); and the duplicates or copies of stage-carriage licences, filed in the Excise Office whence the licences issue, and which are proveable by copies purporting to be certified under the hand of one of the Commissioners of Excise, or of the officer by whom the licence has been granted, or of some other officer of Excise authorised by the commissioners in that behalf (*x*).

(*s*) 6 & 7 Will. 4, c. 71, § 2.

(*t*) 7 & 8 Vict. c. 91, § 2.

(*u*) 8 & 9 Vict. c. 16, § 40.

(*v*) 6 & 7 Vict. c. 86, § 16, enacts, "That the particulars of every licence, which shall be granted as aforesaid, shall be entered in books to be kept for that purpose at the office of the said registrar; and in all courts, and before any justice of the peace, and upon all occasions whatsoever, a copy of any entry made in any such book, and certified by the person having the charge thereof to be a true copy, shall be received as evidence, and be deemed sufficient proof of all things therein registered, without requiring the production of the said book, or of any licence, or of any requisition or other document upon which any such entry may be founded; and every person applying at all reasonable times shall be furnished with a certified copy of the particulars respecting any licensed person without payment of any fee."

(*x*) 10 & 11 Vict. c. 42, which transfers from the Commissioners of Stamps and Taxes to the Commissioners of Excise, the collection and management of the duties in respect of Stage-carriages, &c. See also the former Act of 5 & 6 Vict. c. 79, § 10, which, after reciting, that, by 2 & 3 Will. 4, c. 120, § 11, "a copy of every licence to keep, use, or employ a stage carriage, and of every indorsement made thereon, shall be kept at the office or place from which such licence shall be issued, in order that every person may have a copy

§ 1178. The proof of *certificates* is now much simplified by the Documentary Evidence Act; for if they *purport* to be verified in the manner pointed out by the statute which renders them admissible, they will be received in evidence without proof of the seal, the signature, or the official character of the party verifying them (y). Still, as the language of the Legislature varies much in fixing the mode by which particular certificates are authenticated, it will be convenient briefly to notice those statutes which relate to certificates of most general importance (z).

§ 1179. First, all boards of guardians, or district boards, are authorised to make *certificates* of the *chargeability* of any paupers, and if these documents substantially follow the form given by the Act of 7 & 8 Vict. c. 101, and purport to be signed by the chairman of the respective boards, to be sealed with their seals,

thereof, paying oneshilling for the same; and that it is expedient that such copies, certified as hereinafter mentioned, should be received as evidence of the granting, and of the contents of such licences respectively, and of the indorsements thereon," enacts, "That the commissioners of stamps and taxes, or the officer by whom any such licence shall have been granted, or other officer of stamp duties authorised by the said commissioners in that behalf, shall, upon application made to them or him for that purpose, deliver to the person requiring the same a copy of any such licence, certified according to this Act, on payment of the sum of one shilling; and in all proceedings and upon all occasions whatsoever a copy of any such licence, and of every indorsement thereon, (if any), the same being made and taken from the copy thereof filed or kept at such office or place as aforesaid, and certified to be a true copy under the hand of one of the said commissioners, or of the officer by whom such licence shall have been granted, or other officer authorised as aforesaid, * * * shall be received as evidence, against any and every person appearing by such copy to be named in such licence, that the same was duly granted by such person, and of the contents thereof, and of every indorsement thereon; and in any such case the said commissioners, or any of their officers, shall not be required or compellable to produce in any court, or at any place out of the office of the said commissioners or officers respectively, the original of any such licence or indorsement, or any copy thereof, filed or kept in any such office, or any entry or memorandum relating to such licence in the books of the said commissioners or officers, or to give any other evidence or proof of the granting or contents of any such licence or indorsement than any such copy certified as aforesaid." The above section requires proof of the handwriting of the party certifying; but this is no longer necessary. See 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(y) 8 & 9 Vict. c. 113, § 1. Ante, § 7.

(z) As to certificates of bankruptcy, see ante, § 1140. As to certificates of the acknowledgment of deeds by married women, see ante, § 1136.

(a) 7 & 8 Vict. c. 101, § 89, enacts, "That it shall be lawful for any board of guardians or district board, at any meeting thereof, to make a certificate in the form, or to the effect, contained in the schedule of this Act marked (C), and that every such certificate, * purporting to be signed by the presiding chairman of such guardians or district board, and to be sealed with their seal, and to be countersigned by their clerk, shall, unless the contrary be shown, be taken to be sufficient proof of the truth of all the statements contained in such certificate.

SCHEDULE (C).

In testimony whereof the common seal of the said guardians is hereunto affixed at the meeting of their board this day of , 18 .

(Countersigned)

{ W. J., presiding chairman of the
said board.
{ C. D., clerk [or acting as clerk] to
the board of guardians
of " "

(b) The 8 & 9 Will. 3, c. 30, § 1, enacts, that the certificate shall be under the hands and seals of the majority of the churchwardens and overseers of the parish, and attested by two credible witnesses, and allowed and subscribed by two justices of the place whence such certificate shall come. Then the 3 Geo. 2, c. 29, § 8, provides, that the attesting witnesses, or one of them, shall make oath

§ 1180. Again, the statute of 7 & 8 Geo. 4, c. 28, § 11, enacts, that if a party be indicted for felony committed after a *previous conviction* for felony, "a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, *upon proof of the identity of the person of the offender*, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same." So, the Act of 2 Will. 4, c. 34, which consolidates the law relating to offences against the coin, provides in § 9, that "where any person [who] shall have been convicted of any offence against this Act, shall afterwards be indicted for any offence against this Act, committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, *upon proof of the identity of the person of the offender*, be sufficient evidence of the previous indictment and conviction, without proof of the signature or official character of the person appearing to have signed and certified the same." So, the Act of 4 Geo. 4, c. 64, provides by § 44, that "in case of any prosecution for an escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a *certificate given by the clerk of assize*, or other clerk of the court in which such offender shall have been convicted, shall, together *with due proof of the identity of the person*, be sufficient evidence to the Court and jury, of the nature and fact of the conviction, and of

before the allowing justices that they saw the parish officers sign and seal the certificate, and the justices shall certify that such oath was made before them; "and every such certificate so allowed, and oath of the execution thereof, *so certified by the said justices*," shall be allowed in all courts as proved, and shall be "received as evidence, *without other proof* thereof."

the species and period of confinement to which such person was sentenced."

§ 1181. Under the *Mutiny* and *Marine Mutiny Acts*, no person who has been tried before a court of law for any crime there cognizable, shall be liable to be punished for the same by any court-martial, otherwise than by cashiering; and a certificate, containing the substance and effect, but omitting the formal part of the indictment, conviction, or acquittal of such person, may be transmitted by the clerk or other officer having the custody of the records of the Court, or his deputy, to the officer commanding the regiment or division to which the accused belongs; but both Acts are silent as to the mode of authenticating or proving the certificate, and as to its effect when proved (b). Under the same Acts, orders for transporting offenders sentenced by courts-martial, must be filed of record in the Crown Office of the Queen's Bench; and the clerk of such office is directed, on application, to deliver to the offender or his agent, or to any person applying on her Majesty's behalf, a certificate in writing, "showing the Christian and surname of such offender, his offence, the place where the Court was held before whom he was convicted, the sentence (c), and the conditions on which the order of transportation was given; which certificate shall be sufficient proof of the conviction and sentence of such offender, and also of the terms on which such order for his transportation was given, in any court and in any proceeding" (d). Certificates of previous convictions by courts-martial are also admissible under these Acts, for the purpose of affixing punishment, in case any soldier or marine be found guilty by court-martial of any subsequent offence; and, for the same purpose, certificates of previous convictions by the common-law courts, for offences of a felonious, fraudulent, or unnatural nature, may be

(b) 10 & 11 Vict. c. 12, § 51; 10 & 11 Vict. c. 13, § 5. The corresponding sections in the Acts of the preceding year were precise on this point, but, for some cause, they have been omitted. See 9 & 10 Vict. c. 11, § 2; and c. 12, § 2. Nothing can be more slovenly than the manner in which these annual acts are drawn.

(c) "The sentence" is omitted in the *Mutiny Act*.

(d) 10 & 11 Vict. c. 12, § 23; 10 & 11 Vict. c. 13, § 25.

received; and either class of certificates will be admissible, without proving the signature or official character of the person signing them, provided they purport to be drawn and signed in the mode specified by the respective Acts (*d*). Again, in the common-law courts, if a soldier or marine be tried for obtaining money under false pretences as a deserter, after having been convicted of a like offence, or of a fraudulent confession of desertion, a certificate describing in general terms the former indictment and conviction, and purporting to be signed by the clerk of the Court, or other officer having the custody of the records, or his deputy, or by the clerk of the convicting magistrates, shall, upon proof of identity, be sufficient evidence of the former conviction (*e*).

§ 1182. Under the Act of 9 Geo. 4, c. 31, § 27, two justices are empowered to hear cases of *common assault or battery*; and if, upon the hearing, they “shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a *certificate under their hands* stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. § 28 then provides, that the person obtaining such certificate shall be released from all proceedings, civil or criminal, for the same cause. It seems, that a certificate under this Act should specify the ground of dismissal (*f*), and should be given within a reasonable time after the hearing (*g*), if not before the justices separate (*h*); and it has also been held that, in order to take advantage of the certificate, the defendant must plead it specially (*i*).

§ 1183. The recent Act for the trial of *juvenile offenders* (*j*) enables two justices at petty sessions to try summarily any person

(*d*) 10 & 11 Vict. c. 12, § 16; 10 & 11 Vict. c. 13, § 18.

(*e*) 10 & 11 Vict. c. 12, § 49; 10 & 11 Vict. c. 13, § 52.

(*f*) *Skuse v. Davis*, 10 A. & E. 635; 2 P. & D. 550; 7 Dowl. 774, S. C.

(*g*) See *Christie v. Richardson*, 10 M. & W. 688.

(*h*) Compare *R. v. Robinson*, 12 A. & E. 672; 4 P. & D. 391, S. C.; with *Thompson v. Gibson*, 8 M. & W. 285, 286.

(*i*) *Harding v. King*, 6 C. & P. 427, per Gurney, B. See also *Skuse v. Davis*, 10 A. & E. 635.

(*j*) 10 & 11 Vict. c. 82.

charged with having committed or attempted to commit, or with having been an aider, abettor, counsellor, or procurer in the commission of any simple larceny, or offence punishable as simple larceny, provided the age of such person at the date of the offence shall not, in the opinion of such justices, exceed fourteen years; and it then provides, in § 1, "that if such justices upon the hearing of any such case shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged, on finding surety or sureties for his future good behaviour, or without such sureties, and then make out and deliver to the party charged a *certificate* under the hands of such justices stating the fact of such *dismissal*; and such certificate shall and may be in the form or to the effect set forth in the Schedule" (*k*). § 3 then enacts, that every person who shall have obtained such certificate of dismissal, or shall have been convicted (*l*) under the authority of the Act, shall be released from all further or other proceedings for the same cause. We may here add, that *certificates of indemnity* may sometimes be granted to *witnesses*, who make full disclosures respecting gaming and other illegal transactions (*m*).

§ 1184. The statutes 5 & 6 Vict. c. 100, and 6 & 7 Vict. c. 65, which relate to the *copyright of designs* for articles of manufacture, and provide for the appointment of certain officers, whose duty it shall be to register drawings or prints of the designs therein mentioned, and the transfer of such designs, and to furnish the proprietors thereof with *certificates of such registration*, enact, that these certificates, "purporting to be signed by the registrar

(*k*) *Form of certificate of dismissal.*

—to wit. We — of Her Majesty's justices of the peace for the county of —, [or I, a magistrate of the police court of —, *as the case may be*,] do hereby certify, that on the — day of —, in the year of our Lord —, at —, in the said county of —, M. N. was brought before us, the said justices, [or me, the said magistrate,] charged with the following offence, (that is to say,) [*here state briefly the particulars of the charge*], and that we, the said justices, [or I, the said magistrate,] thereupon dismissed the said charge. Given under our hands, [*or my hand*,] this — day of —.

(*l*) Under § 11, the conviction must be returned to the clerk of the peace, to be kept among the records of the Quarter Sessions.

(*m*) See 8 & 9 Vict. c. 109, § 9; 5 & 6 Vict. c. 31; 7 & 8 Vict. c. 7; noticed ante, § 1070.

or deputy-registrar, and purporting to have the seal of office of such registrar affixed thereto," shall be received as *prima facie* evidence, without proving the official character of the party signing, his signature or his seal (*l*). Similar provisions are contained in the Act for the regulation of charitable loan societies in Ireland (*m*).

(*l*) 5 & 6 Vict. c. 100, § 16, enacts, that "upon every copy, drawing, or print of an original design so returned to the person registering as aforesaid, or attached thereto, and upon every copy, drawing, or print thereof received for the purpose of such registration, or of the transfer of such design being certified thereon or attached thereto, the registrar shall certify under his hand that the design has been so registered, the date of such registration, and the name of the registered proprietor, or the style or title of the firm under which such proprietor may be trading, with his place of abode or place of carrying on his business, or other place of address, and also the number of such design, together with such number or letter, or number and letter, and in such form as shall be employed by him to denote or correspond with the date of such registration; and *such certificate made on every such original design, or on such copy thereof, and purporting to be signed by the registrar or deputy-registrar, and purporting to have the seal of office of such registrar affixed thereto, shall, in the absence of evidence to the contrary, be sufficient proof, as follows* :—

Of the design, and of the name of the proprietor therein mentioned, having been duly registered; and

Of the commencement of the period of registry; and

Of the person named therein as proprietor being the proprietor; and

Of the originality of the design; and

Of the provisions of this Act, and of any rule under which the certificate appears to be made, having been complied with: and any such writing purporting to be such certificate shall, in the absence of evidence to the contrary, be received as evidence, without proof of the handwriting of the signature thereto, or of the seal of office affixed thereto, or of the person signing the same being the registrar or deputy-registrar." § 6 of 6 & 7 Vict. c. 65, enacts that these provisions shall apply to that Act.

(*m*) 6 & 7 Vict. c. 91, § 2, provides for the establishment of a "Loan Fund Board," to which three transcripts of the rules of all Irish loan societies, and of any alteration or amendment thereof, must, by § 11, be sent, and if approved of by the board, they will then be submitted to the certifying barrister. § 13 enacts, that if the said rules, or such alterations or amendments as aforesaid, shall have been certified by the said barrister to be in conformity to law, and the provisions of this Act, the secretary of the board shall annex to or write upon each of the three transcripts a certificate, which, by § 15, must be in the following form, or to the like effect. "This is to certify, that the rules of the — Loan Society, [*or Mont de Piété, as the case may be*] hereunto annexed, numbered —, have been approved by the Loan Fund Board, and duly certified to be in conformity to law, and that the said society is entitled to all the benefits of" this Act. "By order of the Loan Fund Board. Signed, this — day of —"

"Secretary to the Loan Fund Board."

§ 1185. Again, the Act of 4 & 5 Vict. c. 58, which directs the Speaker of the House of Commons to grant a certificate expressing the amount of costs allowed in election petitions, and empowers the party obtaining such certificate to recover these costs by an action of debt, provides, that “the *certificate signed by the Speaker* shall be *conclusive* evidence” of the amount of such costs, and of the title of such party, and that its validity (*n*) shall not be called in question in any court, upon the allegation of any matter or thing anterior to the date thereof (*o*). Similar language is employed in the Act of 3 & 4 Vict. c. 9, which provides (*p*), that all proceedings, civil or criminal, against any person for the *publication of papers printed by order of Parliament*, shall be stayed, upon the production of a certificate under the hand of the Lord Chancellor, the Lord Keeper, or the Speaker of the House of Lords for the time being, the Clerk of the Parliaments, the Speaker of the House of Commons, or the Clerk of the same House, stating that such papers were published by order of either House (*q*).

§ 1186. Under the Act empowering courts of law to order the *examination of witnesses upon interrogatories*, the examinations and depositions must be *certified under the hand* of the commissioners, or other person taking them, and then if it appear to the satisfaction of the judge, that the witness is beyond the jurisdiction

§ 15 then further enacts, “That in any proceeding which may be had for the recovery of any money lent by any loan society, or any other proceeding, civil or criminal, or of what kind or nature whatsoever, the production of a transcript of the rules of such society, with such *certificate as aforesaid* written thereon or annexed thereto, signed or purporting to be signed by the secretary of the Loan Fund Board, shall be *conclusive* evidence of such rules, and of the same having been duly approved and certified, and that such society has been duly established, and is entitled to all the benefits of this Act, and of all other Acts which shall be then in force relating to loan societies in Ireland.” See also §§ 48 & 49 as to what certificates are evidence of connection with the Irish Reproductive Loan Fund Institution, and 7 & 8 Vict. c. 38, § 2, as to the certificates relating to this last-named society.

(*n*) The Act here introduces these words, “the handwriting of the Speaker thereunto being duly verified;” but they are omitted in the text, as the verification is no longer necessary. See 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(*o*) §§ 89 & 92.

(*p*) § 1.

(*q*) The Act adds the words, “together with an affidavit verifying such certificate.” This is not now necessary. See 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

of the Court, or dead, or unable from permanent sickness or infirmity to attend the trial, their examinations and depositions will, without proof of the signature of the certificate, be received in evidence, saving all just exceptions (*r*). Again, under Lord Brougham's Act to amend the law relating to *Letters Patent for Inventions*, if, in any action, suit, or scire facias, touching such letters, a verdict or decree shall pass for the patentee, the judge may grant him a certificate under his hand, and the mere production of what purports to be such a certificate, in any subsequent action or suit of a like nature, will entitle the patentee to treble costs, in the event of the verdict or decree passing in his favour, unless the judge presiding on the second occasion shall certify to the contrary (*s*).

§ 1187. *Certificates of provisional or complete registration*, under the Joint-stock Companies Act, must set forth whether the company has been constituted provisionally or completely, and must also be signed by the registrar or his deputy, and be sealed with the seal of his office; but if they purport to be so executed, they will, *prima facie*, be admissible, and the certificate of complete registration will be taken as evidence of the proper provisions having been inserted in the deed of settlement, and of the performance of the conditions of the Act previously to the granting of such certificate (*t*). *Certificates of the proprietorship of shares in any company*

(*r*) 1 Will. 4, c. 22, § 10; 3 & 4 Vict. c. 105, § 75, *Ir.*, cited ante, § 367.

(*s*) 5 & 6 Will. 4, c. 83, § 3, enacts, "That if any action at law, or any suit in equity for an account, shall be brought in respect of any illegal infringement of such letters patent heretofore or hereafter granted, or any scire facias to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them upon the merits of the suit, it shall be lawful for the judge before whom such action shall be tried to certify on the record, or the judge who shall make such decree or order to give a certificate under his hand, that the validity of the patent came in question before him, which record or certificate being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs." The signature of the judge need not be proved; See 8 & 9 Vict. c. 113, § 2, cited ante, § 7.

(*t*) 7 & 8 Vict. c. 110, §§ 7, 15, 19.

completely registered under the same Act, must be signed by the secretary of the company, and have the seal of the company affixed thereto, and they must also specify the share in the undertaking to which the shareholder is entitled, and the amount paid up on such share. Every such certificate will then be admitted as *prima facie* evidence of the title of the shareholder to the share therein specified (u). Somewhat similar provisions are contained in the Companies Clauses Consolidation Act, as to certificates of the proprietorship of shares in undertakings subject to that Act, but it seems that these last certificates need only be sealed with the seal of the company, and need only specify the share to which the holder is entitled (x). The same statute provides, that, where

(u) 7 & 8 Vict. c. 110, § 51, enacts, "That on demand of the holder of any share in any joint-stock company completely registered under this Act, the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, specifying the share in the undertaking to which such shareholder is entitled, and the amount paid up in respect of such share at the date of such certificate, and shall have the common seal of the company affixed thereto; and for such certificate the company may demand any sum not exceeding one shilling; and that such certificate must be according to the form in the Schedule (I.) to this Act annexed, or to the like effect."

SCHEDULE (I.)

Certificate of Share.

"The — company, first completely registered on the — day of —, 18—. This is to certify, that A. B. of —, is the proprietor of the share, number —, of the — company, subject to the regulations of the said company, and that up to this day there has been paid up, in respect of such share, the sum of —. Given under the common seal of the said company, the — day of —, in the year 18—.

(L. S.) [Signature of the Secretary.]"

§ 52 enacts, "That it shall be the duty of all courts of justice, judges, justices, and others to admit such certificate as *prima facie* evidence of the title of the shareholder to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

(x) 8 & 9 Vict. c. 16, § 11, enacts, that, "on demand of the holder of any share the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled, and the same may be according to the form in the Schedule (A.) to this Act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding two shillings and sixpence."

§ 12 enacts, that "the said certificate shall be admitted in all courts as *prima*

by the Special Act a company shall be restricted from borrowing money on mortgage or bond until a definite portion of their capital has been subscribed or paid up, any justice, upon production to him of the books of the company, and of such other evidence as he shall think sufficient, may grant a certificate that such capital has been subscribed or paid up, and this certificate will be sufficient evidence of the fact stated therein (y). So, under the Lands Clauses Consolidation Act, no company can put in force their compulsory powers of taking land, until the whole capital has been subscribed; but their compliance with this requisite may be proved by a certificate under the hands of two justices, who are authorised to grant it on the application of the promoters, and the production of such evidence as they think sufficient (z).

§ 1188. Under most of the Consolidation Acts passed in the session of 1847, two justices are empowered to correct any omission, mis-statement, or wrong description, respecting any lands, or the owners, lessees, or occupiers thereof, which shall be contained in the Special Act, or in the schedule thereto, or in the plans or books of reference relating to the respective undertakings governed by these Acts, provided it shall appear to such justices that the error arose from mistake; and the correction shall be embodied in a certificate which shall state the particulars of the error, and shall along with the other documents to which it relates, be deposited with the Clerk of the Peace for the county where the lands are

facie evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

SCHEDULE (A.)

Form of Certificate of Share.

"The — Company.

"Number —.

"This is to certify, that A. B. of —, is the proprietor of the share, number —, of 'The — Company,' subject to the regulations of the said company. Given under the common seal of the said company, the — day of —, in the year of our Lord —."

(y) 8 & 9 Vict. c. 16, § 40.

(z) 8 & 9 Vict. c. 18, §§ 16, 17.

situate; and thereupon the undertakers may take the lands or make the works in accordance with such certificate (*a*). Several of these Acts further provide, that copies of the plans and books of reference, and of the corrections or extracts therefrom, certified by the Clerk of the Peace in whose custody the documents are, shall be received in all courts of justice and elsewhere, as evidence of their contents (*b*). Under the Markets and Fairs Clauses Act, two justices are also empowered to grant certificates, which shall be conclusive evidence that the works are completed and fit for public use (*c*); and the Harbours, Docks, and Piers Clauses Act contains a similar enactment, except only, that the certificate must be under the hand of the chairman of Quarter Sessions (*d*). Again, certificates authorising railway companies to modify the construction of roads, bridges, and other engineering works, which, till lately, were granted by the Board of Trade, and which now emanate from the Commissioners of Railways, will be admitted in evidence;—the former, if they purport to have been made by, or by the authority of, the Board of Trade, and to be signed by some officer appointed for that purpose by the board (*e*);—the latter, if they purport to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of the commissioners (*f*).

§ 1189. The *certificates of qualification*, granted to *apothecaries* by the Court of Examiners, will probably not be received in evidence, unless upon proof of the signatures of the examiners, or of some of them, or, if the common seal of the London Society of Apothecaries is affixed thereto, then, upon proof of such seal (*g*). The certificates of due enrolment granted to *attornies* by the registrar, and the annual stamped certificates issued by the Commissioners of Stamps and Taxes, authorising parties to

(*a*) See the Markets and Fairs Clauses Act, 1847, 10 & 11 Vict. c. 14, § 7; the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, § 7; Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, § 7; Towns Improvement Clauses Act, 1847, 10 & 11 Vict. c. 34, § 20; The Cemeteries Clauses Act, 1847, 10 & 11 Vict. c. 65, § 7. See also 10 & 11 Vict. c. 24, § 5.

(*b*) See 10 & 11 Vict. c. 14, § 8; id. c. 17, § 10; id. c. 27, § 10; id. c. 65, § 8.

(*c*) 10 & 11 Vict. c. 14, § 32.

(*d*) 10 & 11 Vict. c. 27, § 26.

(*e*) 8 & 9 Vict. c. 20, §§ 66, 67.

(*f*) Id., coupled with 9 & 10 Vict. c. 105, §§ 2, 4.

(*g*) See ante, § 11.

practise as attornies, must be respectively signed by the registrar (*h*), and by the proper officer at the Stamp Office; and the former certificates must also follow the form given in the Act of 6 & 7 Vict., c. 73 (*i*). As no statute has expressly rendered either of these classes of certificates admissible in evidence, it would probably be deemed still necessary, notwithstanding the Documentary Evidence Act (*j*), to prove the signatures and official characters of the parties signing them (*k*).

§ 1190. *Surgical certificates*, which, under the Acts regulating factories and print works, are *primâ facie* evidence of the age of the persons named therein, would, it seems, be received in evidence without proof, provided they were drawn in the form, and purported to be signed by the persons, prescribed by these Acts (*l*). Under the statutes relating to *marriages*, if any action be brought, as it may be, against a party for having *vexatiously entered a caveat*, "a copy of the declaration of the Registrar-General, purporting to be sealed with the seal of the General Register Office, shall be evidence that the Registrar-General has declared such caveat to have been entered on frivolous grounds, and that they ought not to obstruct the grant of the licence, or the issue of the certificate," and the plaintiff thereupon shall recover costs and damages (*m*).

§ 1191. Under the Acts ^{authorising} ~~requiring~~ the registration of deeds, conveyances, and wills, in Yorkshire and Middlesex, the respective registrars, or their deputies, if required by any person, are bound to give certificates of searches having been made among the

(*h*) The Incorporated Law Society is the present registrar, and their secretary signs the certificates.

(*i*) See 6 & 7 Vict. c. 73, §§ 21—26, and Sched. 3; and 37 Geo. 3, c. 90, § 26.

(*j*) 8 & 9 Vict. c. 113, § 1, ante, § 7.

(*k*) See *Sparling v. Haddon*, 9 Bing. 11.

(*l*) See 7 & 8 Vict. c. 15, §§ 9, 10, 53 and Sched.; and 3 & 4 Will. 4, c. 103, §§ 11—13, as to factories; and 8 & 9 Vict. c. 29, §§ 8, 9, 10, 14, 17, 19, 20, and Sched. as to print works.

(*m*) 7 Will. 4 & 1 Vict. c. 22, § 5; 6 & 7 Will. 4, c. 85, § 37; 7 & 8 Vict. c. 81, § 43, *Ir*.

registered memorials of those instruments (*n*), as also certificates of the memorials of any judgment, statute, or recognizance registered (*o*). Both these classes of certificates must be under the hand of the registrar, testified by two credible witnesses (*p*), and the latter class must specify the day on which the memorial was registered, and in what book, page, and number, the same was entered (*q*). Whether, since the Documentary Evidence Act (*r*), it would be necessary to call either of the attesting witnesses to these documents, or otherwise to prove the signature of the registrar or his deputy, may be doubted.

§ 1192. Where deeds, memorials, or other instruments, are required by statute to be enrolled or registered, the mode of proving the enrolment or registration will depend in great measure on the language employed in the particular Act; but, perhaps, thus much may be laid down as a general rule, that where, in pursuance of the uniform practice of the office of enrolment or registration, the officer, at the time of making the proper entry in his books, returns to the party the original instrument, with a certificate or memorandum of enrolment or registration endorsed thereon, such certificate or memorandum will be evidence both of the fact and date of enrolment or registration, without proving the signature or official character of the person signing it (*s*). This doctrine has been

(*n*) As to the West Riding, 2 & 3 Anne, c. 4, § 12; 5 Anne, c. 18, § 9; 6 Anne, c. 35, §§ 22, 34; as to the West Riding, 6 Anne, c. 35, § 22; as to the North Riding, 8 Geo. 2, c. 6, § 27; as to Middlesex, 7 Anne, c. 20, § 12.

(*o*) 5 Anne, c. 18, § 5; 6 Anne, c. 35, § 20; 8 Geo. 2, c. 6, § 19; 7 Anne, c. 20, § 19.

(*p*) See last two notes.

(*q*) See note last but one.

(*r*) 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(*s*) *Doe v. Lloyd*, 1 M. & Gr. 684, 685. There, a deed, requiring enrolment under the Mortmain Act, was produced at the trial, and bore the following indorsement:—"Enrolled in the High Court of Chancery the 17th of December, 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. D. Drew." The Court held that, without proving the signature or official character of Mr. Drew, the memorandum was evidence that the deed was enrolled on the day stated, it having been *certified to the Court* by an officer of the Enrolment Office, that the memorandum was in the usual form. See ante, § 19.

applied to the enrolment of bargains and sales under the Act of 27 Hen. 8, c. 16 (*t*); of leases of lands within the Duchy of Lancaster (*u*); and of indentures under the Mortmain Act (*x*); and it seems equally applicable to the enrolments of memorials of grants of annuities (*y*); to the enrolments under the Act abolishing fines and recoveries, whether of assurances by tenants in tail (*z*), or of consents of protectors of settlements (*a*), or of conveyances of the real estate of bankrupt tenants in tail by the commissioner (*b*); and also to a variety of other enrolments, which are rendered necessary by Act of Parliament. Indeed, it is enacted by statute, with respect to all deeds relating to the possessions of the Crown, which are enrolled in the land revenue office, that a memorandum of enrolment on the deed, purporting to be signed by the keeper of the records and enrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only of the enrolment, but even of the due execution of the deed, and that, too, without proof of the signature attached to it (*c*). So, the statutes which

(*t*) *Kinnersley v. Orpe*, 1 Doug. 58, per Buller, J.; recognised in *Doe v. Lloyd*, 1 M. & Gr. 685; *Compton v. Chandless*, 4 Esp. 19, per Lord Kenyon.

(*u*) *Kinnersley v. Orpe*, 1 Doug. 56. See 1 & 2 Geo. 4, c. 52, § 8, which requires all leases and deeds of exchange executed under that Act, to be enrolled in the Auditor's Office.

(*x*) *Doe v. Lloyd*, 1 M. & Gr. 671; 1 Scott, N. R. 505, S. C.; 9 Geo. 2, c. 36.

(*y*) 53 Geo. 3, c. 141, § 7. This Act is amended and explained by 3 Geo. 4, c. 92, and 7 Geo. 4, c. 75. See *Compton v. Chandless*, 4 Esp. 19, per Lord Kenyon.

(*z*) 3 & 4 Will. 4, c. 74, § 41.

(*a*) §§ 46, 51, 59.

(*b*) § 59.

(*c*) 2 Will. 4, c. 1, § 26, enacts, "That where any deed or certificate, receipt, or other instrument, which shall appear to have been made, given, or executed under the authority of this Act, or of any Act heretofore passed relating to the possessions and land revenues of the Crown, shall have written thereon a memorandum of its having been enrolled in the said office of records and enrolments, and such memorandum shall purport to be signed by the Keeper of the Records and Enrolments, or by any person acting as his deputy or assistant, such memorandum shall, in the absence of evidence to the contrary, be sufficient proof of the deed, certificate, receipt, or other instrument having been duly made, granted, given, or executed by the party or parties by whom the same shall purport to have been signed or executed, and of its having been duly enrolled as stated by such memorandum, and of the provisions of the Act, under which the same shall appear to have been made, granted, given, or executed, having been duly complied with; and such memorandum shall be receivable in evidence without proof of the handwriting of the signature thereto."

~~require~~^{authorise} the registration of deeds, conveyances, and wills, in the several ridings of Yorkshire, and in Middlesex^(d), expressly declare, that the certificates indorsed on the registered instruments, if signed by the proper officer, shall be taken as evidence of the respective registries in all courts of record^(e); and then the Documentary Evidence Act provides, that it shall be unnecessary to prove the signature or official character of the person so signing^(f).

§ 1193. It does not appear to be very clearly determined how far enrolments can be proved by the production of *office copies*; but it would seem, that the enrolments of memorials of grants of annuities^(g), and perhaps also, the enrolments of bargains and sales under the Act of 27 Hen. 8, c. 16, are proveable in this manner; and if this be so, office copies of the enrolments of bargains and sales in the several ridings of Yorkshire are also admissible in evidence^(h). However, if they are not, no doubt can be entertained, seeing that the enrolments are records, but that

(d) As to the West Riding, see 2 & 3 Anne, c. 4; 5 Anne, c. 18; 6 Anne, c. 35, § 34; as to the East Riding, see 6 Anne, c. 35; as to the North Riding, see 8 Geo. 2, c. 6; and as to Middlesex, see 7 Anne, c. 20; 25 Geo. 2, c. 4.

(e) For instance, the Act of 2 & 3 Anne, c. 4, enacts, in § 8, "That the register or his deputy, at the time of entering such memorial, shall indorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time on which such memorial is so entered and registered, expressing also in what book, page, and number the same is entered, and that the said register or his deputy, shall sign the said certificate when so indorsed; which certificates shall be taken and allowed as evidence of such respective registries in all courts of record whatever." The same clause is re-enacted in 6 Anne, c. 35, § 11; 7 Anne, c. 20, § 6; and 8 Geo. 2, c. 6, § 12; See also, 2 & 3 Anne, c. 4, § 18; 5 Anne, c. 18, § 2; 6 Anne, c. 35, § 17; and 8 Geo. 2, c. 6, §§ 21, 22.

(f) 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(g) 53 Geo. 3, c. 141, § 7, which enacts that, "there shall be paid the fee of one shilling for every certificate and *copy given*."

(h) 5 Anne, c. 18, § 2, enacts, "That all deeds of bargain and sale so enrolled in the said public or register office as aforesaid, which shall appear to be so enrolled by an indorsement or certificate on the said deeds of bargain and sale signed by the said register or his deputy, and that *all copies* of the enrolments thereof remaining on record in the said register office, shall be allowed in all courts where such bargains and sales or copies shall be produced, to be as good and sufficient evidence as any bargains and sales enrolled in any of the courts at Westminster, and the copies of the enrolments thereof." A similar clause is contained in § 17 of 6 Anne, c. 35, and § 21 of 8 Geo. 2, c. 6. Qu. whether the "*copies*" spoken of mean office copies or examined copies.

these enrolments may be proved by examined copies. In some few cases, where the copy of the enrolment is made evidence, not only of the enrolment itself, but of the *contents of the instruments enrolled*, such copy must combine the requisites, both of an office, and of an examined, copy. For instance, the Act of 5 & 6 Vict. c. 94, which empowers the principal officers of Her Majesty's Ordinance to enrol in the Exchequer or in Chancery all deeds, decrees, evidences, writings or other instruments, relating to the lands and hereditaments vested in them, enacts, that a copy of the enrolment of every such document, "signed by the proper officer having the custody of such enrolment, and proved upon oath to be a true copy," shall, for every purpose, be sufficient evidence of the contents of such documents in all courts of law and equity, and, on every other occasion, shall be of the same force and effect as such document would be, if produced (i). So, the Act of 10 Anne, c. 18, which relates to indentures of bargain and sale enrolled under the stat. 27 Hen. 8, c. 6, enacts, that, where any indenture of bargain and sale enrolled shall be pleaded with a *profert*, "a copy examined with the enrolment, and signed by the officer having the custody of such enrolment, and proved upon oath to be a true copy, so examined and signed," shall be of the same force as the indenture would be, if produced (k). The Act of 8 Geo. 2, c. 6, which, among other things, empowers persons claiming title to real estate in the North Riding of Yorkshire to register at full length the deeds, writings, wills, or conveyances, under which they claim, enacts, that all copies of the enrolments of such instruments, signed by the registrar or his deputy, and attested by two or more witnesses, shall be allowed in all courts of record to be sufficient evidence of such deeds, writings, wills, or conveyances, in the event of the originals being destroyed by fire or other accident (l).

§ 1194. With respect to the mode of proving *bye-laws*, no general rule can be laid down, as the proof varies according to the particular language of the statute or charter, under the authority of which they have been made. For instance, every company, subject

(i) § 33.

(k) 10 Anne, c. 18, § 3.

(l) 8 Geo. 2, c. 6, § 22.

to the provisions of the Joint Stock Companies Act, is empowered, on complete registration, "to make, from time to time, at some general meeting of shareholders specially summoned for the purpose, bye-laws for the regulation of the shareholders, members, directors, and officers of the company, such bye-laws not being repugnant to, or inconsistent with, the provisions of the Act, or of the deed of settlement of the company" (m); "and in all actions, suits, and other legal proceedings for the enforcement of such bye-laws, or other penalties for the breach thereof," the production of a written or printed copy *purporting to have the official seal of the register of joint stock companies affixed thereto*, shall be sufficient evidence of such bye-laws (n). Again, the Companies Clauses Consolidation Act empowers every company, to which that Act applies, to make bye-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs (o); and the production of a written or printed copy *purporting to have the seal of the company affixed thereto*, "shall be sufficient evidence of such bye-laws in all cases of prosecution under the same" (p). With respect to such

(m) 7 & 8 Vict. c. 110, § 25. See also § 47, which requires these bye-laws to be registered and published.

(n) 7 & 8 Vict. c. 110, § 48; 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(o) 8 & 9 Vict. c. 16, § 124 enacts, that "it shall be lawful for the company from time to time to make such bye-laws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such bye-laws, and make others, provided such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the Special Act; and such bye-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and a copy of such bye-laws shall be given to every officer and servant of the company affected thereby." § 125 enacts, that "it shall be lawful for the company, by such bye-laws, to impose such reasonable penalties upon all persons, being officers or servants of the company, offending against such bye-laws, as the company shall think fit, not exceeding five pounds for any one offence." § 126 enacts, that "all the bye-laws to be made by the company shall be so framed as to allow the justice, before-whom any penalty imposed thereby may be sought to be recovered, to order a part only of such penalty to be paid, if such justice shall think fit."

(p) § 127; 8 & 9 Vict. c. 113, § 1, cited ante, § 7; qu. whether the same proof would suffice, where the bye-laws were offered in evidence by the company, in defending an action for false imprisonment.

bye-laws as any *railway company* is empowered to make for regulating the travelling upon, or using and working the railway, or for imposing penalties upon *persons other than its servants*, it would seem that, before these bye-laws can be enforced, the company must produce a copy purporting to be under its seal, and must show that a certified copy has been sent to the Board of Trade, or since the 9th of November, 1846 (*g*), to the Commissioners of Railways, and has been allowed, or at least not disallowed, by these respective bodies (*r*); and further, that the bye-laws have been duly published; but, for this purpose it will be sufficient to prove, that a printed paper, or painted board, containing a copy, was affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature of the respective bye-laws, and in case of its being afterwards displaced or damaged, then, that such paper or board was replaced as soon as conveniently might be (*s*). In many of the earlier Railway Acts a clause was introduced, which rendered it necessary to obtain the sanction of certain justices or other persons to the bye-laws made by the company, but the Act of 3 & 4 Vict. c. 97, enacts in § 10, that “so much of every clause, provision and enactment in any Act of Parliament heretofore passed, as may require the approval or concurrence of any justice of the peace, court of Quarter Sessions, or other person or persons, other than members of the said companies, to give validity to any bye-laws, orders, rules or regulations made by any such company, shall be repealed.”

§ 1195. The bye-laws made by the Corporation of London in pursuance of certain Acts (*t*) for *regulating the Port of London* and the *vend and delivery of coals*, may be proved by the production of a printed or written copy purporting to be signed by the *town clerk* of the city of London, and such copy “shall,

(*g*) 9 & 10 Vict. c. 105, § 2; Gazette of Friday, 6th of Nov., 1846.

(*r*) Compare 3 & 4 Vict. c. 97, §§ 7—10, and 8 & 9 Vict. c. 20, §§ 108—111. As to proof of the order of the Board of Trade, allowing the bye-laws, see ante, § 1177; and, as to proof of similar order by Comm. of railways, see ante, § 1172.

(*s*) 8 & 9 Vict. c. 20, §§ 110, 111.

(*t*) 10 Geo. 4, c. cxxiv.; 1 & 2 Will. 4, c. lxxvi.; 1 & 2 Vict. c. ci.; 8 & 9 Vict. c. 101.

without any other proof, be admitted as evidence of such bye-laws, and of the making, submission, allowance, and publication thereof, unless the contrary shall be proved" (*u*). So, the bye-laws made by the commissioners for the registration and regulation of *coahwhippers* in the port of London, may be proved by a copy purporting to be authenticated by the signature of *the chairman of the commissioners*, and this copy "shall, without any further proof, be received as evidence of the bye-law or regulation of which it purports to be a copy, and of such bye-law or regulation having been duly made, submitted, issued, and published" (*x*). Again, the rules and bye-laws made by the Board of Trade for the protection of the channel fisheries, printed copies of which are deposited with the clerks of the peace for the counties on the eastern coast, may for the purpose of convicting any person offending against the same, be proved by the production of a printed copy obtained from the office of any clerk of the peace with whom the same may be lodged, and purporting to be certified by him as a true copy; and such copy shall be evidence, not only of such rules and bye-laws, but of their due publication (*y*).

§ 1196. The Municipal Corporation Act, which empowers borough councils to make bye-laws, contains no provision for their proof when made. In order, therefore, to prove them, it would seem to be necessary, not only to produce a copy under the corporate seal, but to show that they were made at some meeting of the council at which two-thirds of the members were present;—that a minute of them having been made was duly entered in the book of proceedings, and was signed by the chairman of the meeting;—that they were legally published, by affixing them on the door of the Town Hall or other public place;—that a copy properly sealed was transmitted to one of the Secretaries of State; and that they were not disallowed within forty days after such copy had been sent (*z*).

(*u*) 8 & 9 Vict. c. 101, §§ 6, 7; and 8 & 9 Vict. c. 113, § 1, cited ante, § 7.

(*x*) 9 & 10 Vict. c. 36, §§ 27—29. See also 6 & 7 Vict. c. ci., §§ 25—27.

(*y*) 6 & 7 Vict. c. 79, § 5.

(*z*) 5 & 6 Will. 4, c. 76, §§ 90, 69. As to pleading such bye-laws, see *Elwood v. Bullock*, 6 Q. B. 384—388. For other enactments respecting the making and

§ 1197. We proceed, in the next place, to consider the ADMISSIBILITY AND EFFECT OF PUBLIC DOCUMENTS, as instruments of evidence. And here, following the same course which we pursued, when explaining in what manner public documents might be proved, we shall *first* draw attention to *Statutes, State Papers*, and other writings of a cognate character. With respect to these documents it may be generally observed, that, provided they have been duly authenticated in some one of the modes stated above, and their contents be pertinent to the issue, they will be admissible, either as *prima facie* or conclusive proof of the facts directly stated in them; and in many cases they will even be received in evidence of such matters, as are inserted in them by way of introductory *recital*. Thus, where certain *public statutes* recited, that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the government in relation thereto (*a*). So a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and it will be taken notice of without proof; and this, whether the nation be or be not a party to the war (*b*). So, a recital of relationship, even in a *private Act*, has been received by the House of Lords as cogent evidence of pedigree in a peerage case; because such recital is never inserted in a private Act, unless its truth has first been ascertained by the judges, to whom the bill has been referred (*c*). But, in general, a private statute, though it contains a clause requiring it to be judicially noticed, is not, as against *strangers*, any evidence of the facts recited (*d*); neither does it

proof of bye-laws, see "The Markets and Fairs Clauses Act, 1847," 10 & 11 Vict. c. 14, §§ 42—49; "The Commissioners Clauses Act, 1847," id. c. 16, §§ 96—98; "The Harbours, Docks, and Piers Clauses Act, 1847," id. c. 27, §§ 83—90; "The Towns Improvement Clauses Act, 1847," id. c. 34, §§ 200—207; and "The Town Police Clauses Act, 1847," id. c. 89, § 71.

(*a*) *R. v. Sutton*, 4 M. & Sel. 532.

(*b*) *R. v. De Berenger*, 3 M. & Sel. 67, 69.

(*c*) *Wharton Peer. Ca.* 12 Cl. & Fin. 302.

(*d*) *Brett v. Beales*, M. & M. 421; *Taylor v. Parry*, 1 M. & Gr. 604, 619, 622.

affect the public with a knowledge of its contents (*e*). The recitals, too, in a public Act, are not conclusive evidence; and therefore, where the Schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false (*f*).

§ 1198. The *Speech of the Sovereign* in opening Parliament, and the Addresses of either House to the Crown would seem to be evidence, in the nature of reputation, of the public matters they recite (*g*). The *Journals*, also, of either House, are the proper evidence of the action of that House, upon all matters before it, whether legislative, ministerial, or in the Lords' House, judicial (*h*). The committee of privileges has even admitted an entry in their Journals as evidence of limitations in a patent of peerage, without requiring the production of the patent (*i*). So, a foreign declaration of war, transmitted by the British Ambassador to the Secretary of State's office, and produced by a clerk from that office, is sufficient evidence to prove the date of the commencement of hostilities between two foreign states (*k*). How far *diplomatic correspondence* may go to establish the facts recited, does not clearly appear (*l*); but, in America, such correspondence, communicated by the President to Congress, has been held sufficient evidence of the acts of foreign governments and functionaries, therein narrated (*m*); and, in that country, it seems to be generally admissible, whenever the facts recited are not the principal points in issue, but merely require proof, in order to support some introductory averment in the pleadings (*n*).

§ 1199. The government *Gazette* is admissible and sufficient

(*e*) *Ballard v. Way*, 1 M. & W. 529, per Lord Abinger.

(*f*) *R. v. Greene*, 6 A. & E. 548.

(*g*) *R. v. Francklin*, 17 How. St. Tr. 636—638.

(*h*) *Jones v. Randall*, 1 Cowp. 17; *Root v. King*, 7 Cowen, 613.

(*i*) *Lord Dufferin's case*, 4 Cl. & Fin. 568.

(*k*) *Thelluson v. Cosling*, 4 Esp. 266.

(*l*) See *R. v. Francklin*, 17 How. St. Tr. 638.

(*m*) *Radcliff v. Un. Ins. Co.*, 7 Johns. 38, 51; *Talbot v. Seeman*, 1 Cranch, 1, 37, 38.

(*n*) *Radcliff v. Un. Ins. Co.*, 7 Johns. 51, per Kent, C. J.

evidence of such acts of State, as are usually announced to the public through that channel, such as proclamations, addresses received by the Crown, and the like (*o*). For, besides the motives of official duty, and self-interest, which bind the publisher to accuracy, it must be remembered, that, intentionally to publish anything as emanating from public authority, with knowledge that it did not so emanate, would be a misdemeanor (*p*). But in regard to other acts of public functionaries, having no relation to the affairs of government, such as an order in council for the division of a parish under the Act of 58 Geo. 3, c. 45 (*q*),—the appointment of an officer to a commission in the army (*r*),—or the Queen's grant of land to a subject (*s*),—the Gazette cannot in general be read in evidence. In some few cases, indeed, the Legislature has interposed, and expressly made this paper evidence of certain facts, which are directed to be published in it. For instance the *statutes*, which respectively regulate the issue of bank notes in England and Ireland, after requiring the Commissioners of Stamps and Taxes to publish in the London and Dublin Gazettes respectively certificates containing certain particulars, enact that the Gazette, in which such publication shall be made, shall be conclusive evidence in all courts of the amount of bank notes, which the banker named in the certificate is by law authorised to issue and have in circulation (*t*); the Irish Act adding, "exclusive of an amount equal to the monthly average amount of the gold and silver coin held by such banker as herein provided." So, the Act for facilitating the dissolution of certain railway companies, enacts, that the chairman at every meeting, convened for the purpose of deciding on the dissolution or bankruptcy of the company, shall sign a minute of the proceedings; and the Gazette, containing the advertisement of such minute, shall be evidence of

(*o*) *R. v. Holt*, 5 T. R. 436, 443; *Att.-Gen. v. Theakstone*, 8 Price, 89; *Picton's case*, 30 How. St. Tr. 493; *Van Omeron v. Dowick*, 2 Camp. 44; B. N. P. 226.

(*p*) 2 Ph. Ev. 108; 5 T. R. 442, A. G. *arguendo*, citing Lord Holt.

(*q*) *Greenwood v. Woodham*, 2 M. & Rob. 363, per Wightman, J.

(*r*) *R. v. Gardner*, 2 Camp. 513, per Lord Ellenborough; *Kirwan v. Cockburn*, 5 Esp. 233, per *id.*

(*s*) *R. v. Holt*, 5 T. R. 443, per Lord Kenyon.

(*t*) 7 & 8 Vict. c. 32, § 15; 8 & 9 Vict. c. 37, § 10. *Ir.*

the meeting having been duly called and held, and of the resolutions recorded having been duly passed by the majorities therein mentioned (u). So, any printed copy of the London Gazette, purporting to be printed and published by the authorised person, must be admitted as evidence of any Treasury warrant issued by virtue of the Post Office Acts (x), "and contained in any such Gazette, and of the due issuing thereof, and of the rates and regulations contained in any such warrant having been duly made and established, and of the other contents of any such warrant, without any further or other proof of such warrant" (y). So, the due publication of final notices, under the Acts relating to the drainage of lands in Ireland (z), may be conclusively proved by the production of the Dublin Gazette, in which they shall be published (a). So, if a bankrupt does not dispute the fiat within the prescribed period after the advertisement of the bankruptcy in the Gazette, this advertisement, provided the adjudication has been made since the 11th of November, 1842 (b), is, as against him, and all persons, whom but for the bankruptcy he might have sued, conclusive evidence of the fact of bankruptcy, and of the date of the fiat (c).

§ 1200. *Gazettes, in common with all other newspapers, are*

(u) 9 & 10 Vict. c. 38, § 16.

(x) 3 & 4 Vict. c. 96; 7 & 8 Vict. c. 49; 10 & 11 Vict. c. 85.

(y) 10 & 11 Vict. c. 85, § 19.

(z) 5 & 6 Vict. c. 89, Ir.; 8 & 9 Vict. c. 69, Ir.; 9 & 10 Vict. c. 4, Ir.; 10 & 11 Vict. c. 79, Ir.

(a) 10 & 11 Vict. c. 79, § 4.

(b) *Edwards v. Sherren*, 11 M. & W. 595.

(c) 5 & 6 Vict. c. 122, § 24, which enacts, that, "if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding, to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and effect, the *Gazette containing such advertisement* shall be *conclusive* evidence in all cases as against such bankrupt, and in all actions at law or suits in equity, brought by the assignees for any debt or demand, for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the Gazette to bear date."

frequently offered in evidence, with the view of fixing an adversary with *knowledge* of certain facts advertised therein; but here it is always advisable, and sometimes necessary, unless the case is governed by a special Act of Parliament (*c*), to furnish *some* evidence, from which the jury may infer, that the party sought to be affected by the notice has read it. This doctrine applies even to cases, where the notice published in the Gazette relates to some public matter, as, for instance, the blockade of a foreign port; for although, as between nation and nation, the notification of a blockade may, from the moment it is made by one state to the government of another, bind all the subjects of the latter (*d*), this rule will not extend to suits between private individuals. Therefore, where an action was brought on a ship policy, and the underwriters urged in defence, that the voyage was to a port which the master knew was blockaded, and that consequently the policy was void, the Court held that the jury were justified in negating any knowledge on the part of the master, though it appeared that he was in this country some time after the publication of the Gazette in which the blockade was notified (*e*). The Gazette containing a *notice of dissolution of partnership* will, indeed, be admissible without any additional proof, as against all persons who have had no previous dealings with the firm (*f*); and even against those who have had such dealings, it will, after formal proof of the actual dissolution by producing the deed, be evidence to show that the partnership was openly dissolved (*g*). Still, in order to deprive the old correspondents of the firm of their right of action against the retiring partner, further evidence must be given than the mere production of the Gazette in which notice of dissolution has been inserted (*h*); and if the defendant be not in a condition to prove that a circular was sent in due course to the plaintiff, he must at least show facts, from which an inference may

(*c*) See 6 Geo. ^{4th} c. 16, § 83.

(*d*) *Neptunus*, 2 Rob. Adm. R. 110, per Sir W. Scott; *Adelaide*, id. 112, n.

(*e*) *Harratt v. Wise*, 9 B. & C. 712.

(*f*) *Godfrey v. Turnbull*, 1 Esp. 371, per Lord Kenyon; *Newsome v. Coles*, 2 Camp. 617, per Lord Ellenborough; *Wright v. Fulham*, 2 Chit. R. 121; *Hart v. Alexander*, 7 C. & P. 753, per Lord Abinger.

(*g*) *Hart v. Alexander*, 7 C. & P. 749, per Lord Abinger.

(*h*) *Graham v. Hope*, 1 Pea. R. 154, per Lord Kenyon.

be drawn that the plaintiff has seen the notice. This may be done in a variety of ways, as by proving that the plaintiff has been in the habit of taking in the Gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice, or has evinced an unusual interest in the affairs of the partnership, and the like (*i*). But it seems not enough to prove that the newspaper was circulated in the immediate neighbourhood of the plaintiff's residence (*k*).

§ 1201. We proceed now to consider the *admissibility and effect of judicial records* and documents ; and first, as to *judgments*. Here, if the object be merely to prove the *existence of the judgment, its date, or its legal consequences*, the production of the record, or the proof of an examined copy, is conclusive evidence of these facts against all the world. This rests on the ground that a judgment is a public transaction of a solemn character, which must be presumed to be faithfully recorded. Therefore, if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment (*l*) ; but it is no evidence whatever, that the defendant was the prosecutor, even though his name appear on the back of the bill (*m*), or of his malice, or of want of probable cause (*n*) ; and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt (*o*). So, a judgment against a master or principal for the negligence of his servant or agent, is conclusive evidence against the servant or agent of the fact, that the master

(*i*) *Godfrey v. Macauley*, 1 Pea. R. 155, n. ; *Jenkins v. Blizard*, 1 Stark. R. 419, per Lord Ellenborough ; *Hart v. Alexander*, 2 M. & W. 484 ; *Leeson v. Holt*, 1 Stark. R. 186. As to notices by carriers restricting their liability, see 1 Will. 4, c. 68 ; *Munn v. Baker*, 2 Stark. R. 255 ; *Rowley v. Horne*, 3 Bing. 2.

(*k*) *Norwich and Lowestoft Navigation Co. v. Theobald*, M. & M. 153, per Lord Tenterden.

(*l*) *Legatt v. Tollervey*, 14 East, 302.

(*m*) B. N. P. 14.

(*n*) *Purcell v. Macnamara*, 9 East, 361 ; 1 Camp. 199, S. C. ; *Inclendon v. Berry*, 1 Camp. 203, n. (*a*).

(*o*) B. N. P. 15.

or principal has been compelled to pay the amount of damages awarded; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent (*q*). So, a judgment recovered against a surety will be evidence for him, to prove the amount which he has been compelled to pay for the principal debtor; and the same doctrine will apply to other cases, where the party has a remedy over, as for contribution, or the like (*r*). In an action against a surety, where the defence was that the plaintiff had received certain monies from the principal in satisfaction of his damages, it was held that the plaintiff, on traversing this plea, might put in evidence a judgment recovered from him by the assignees of the principal for the amount so received as money had to their use, not indeed as conclusive proof that the money had been paid to him by the principal in the way of fraudulent preference, but as showing that he had actually repaid the money to the assignees, and as generally explaining the transaction (*s*).

§ 1202. If the object be to discredit a witness, by proving that he has given different testimony on a former trial, the judgment in that cause, though the litigating parties be strangers, will be admissible for the purpose of introducing the evidence of his former statements (*t*). So, upon an indictment for perjury committed on a trial, the record will be evidence to show that such a trial was had (*u*); and if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody, will be conclusive evidence that the prisoner was convicted of the crime stated therein (*x*). So, in an action against a sheriff for an escape, or for other neglect in regard to an execution, it is usual to give in evidence judgments

(*q*) *Green v. New River Co.*, 4 T. R. 590; *Pritchard v. Hitchcock*, 6 M. & Gr. 165, per Cresswell, J.; *Tyler v. Ulmer*, 12 Mass. 166, per Parker, C. J.

(*r*) *Powell v. Layton*, 2 N. R. 371, per Mansfield, C. J.; *Kip v. Brigham*, 6 Johns. 158; 7 Johns. 168; *Griffin v. Brown*, 2 Pick. 304.

(*s*) *Pritchard v. Hitchcock*, 6 M. & Gr. 151.

(*t*) *Clarges v. Sherwin*, 12 Mod. 343; *Foster v. Shaw*, 7 Serg. & R. 156.

(*u*) *R. v. Iles*, Cas. temp. Hardw. 118; B. N. P. 243; *R. v. Hammond Page*, 2 Esp. 649, n.

(*x*) *R. v. Shaw*, R. & R. 526.

against third persons, to show the character in which the plaintiff claims, and the amount of damage he has sustained (*y*). So, if A. sues the sheriff for trespass to his goods, the latter may give in evidence a judgment against B., and then show that he seized the goods by virtue of a *fiery facias* upon that judgment, and that the goods belonged to B. (*z*). So, where the judgment constitutes one of the muniments of a party's title to land or goods,—as where a deed was made under a decree in Chancery (*a*), or goods were purchased at a sale made by a sheriff upon execution (*b*),—the record may be given in evidence against a party who is a stranger to it. So, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate as his own property, has been held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining in what character the father, through whom the defendant claimed, had afterwards taken actual possession of the estate (*c*). Many other instances might be given of the admissibility of judgments *inter alios*, where the *record is matter of inducement*, or merely introductory to other evidence; but those cited will be sufficient to illustrate the principle, and this is all that is aimed at in the present treatise.

§ 1203. Adjudications are sometimes tendered in evidence for the purpose of *protecting* the magistrates who pronounced, and the officers who enforced, them, against an action of trespass. And here the rule of law is, that, provided the adjudication, when read in connection with the other proceedings, shows, either expressly or by fair and necessary inference, that the judge had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if these facts are necessary to

(*y*) *Davies v. Lowndes*, 1 Bing. N. C. 607, per Tindal, C. J.; *Adams v. Balch*, 5 Greenl. 188.

(*z*) 1 St. Ev. 255.

(*a*) *Barr v. Gratz*, 4 Wheat. 213.

(*b*) 1 St. Ev. 255; *Witmer v. Schlatter*, 2 Rawle, 359; *Jackson v. Wood*, 3 Wend. 27, 34; *Fowler v. Savage*, 3 Conn. 90, 96.

(*c*) *Davies v. Lowndes*, 6 M. & Gr. 471, 520; 1 Bing. N. C. 607; 1 M. & G. 474, S. C.

give the judge jurisdiction (*d*); or, perhaps, it may be more correctly stated, that the production of the judgment and of the proceedings on which it is founded, will be a bar to all inquiry respecting the truth or falsehood of the facts stated, and will conclusively establish the immunity of the judge (*e*). This doctrine, which is essential to the administration of the law,—since, without it, who would be found so bold as to act as a magistrate?—is not required for the protection of judges of record, because by an excellent law of very great antiquity, no action will lie against such persons for any acts done by them in the exercise of their judicial functions (*f*). The rule is therefore generally applied to, and will certainly be best illustrated by, those cases, in which justices of the peace have been sued by parties who imagined themselves wronged by a conviction or order.

§ 1204. *Brittain v. Kinnaid* (*g*) is a leading authority on this subject. That was an action of trespass against magistrates for taking and detaining a vessel. At the trial it appeared that the vessel was seized by the defendants, as magistrates, under the Bum-boat Act now repealed (*h*), and the plaintiff sought to prove that it was not a boat within the meaning of the Act; but this he was not permitted to do, on the ground that the conviction was the only evidence of what the magistrates had determined. The conviction was then put in, and as no defects appeared upon the face of it, and as the vessel was there called a boat, it was held to constitute a conclusive defence to the action, and the plaintiff was accordingly nonsuited. On a motion for a new trial, it was strongly urged that the magistrates had no right to assume to themselves jurisdiction, by calling that a boat which was in fact a

(*d*) See and compare *Taylor v. Clemson*, 2 Q. B. 1031, 1032, per Tindal, C. J., delivering the judgment of the Exchequer Chamber; *Basten v. Carew*, 3 B. & C. 652, 653, per Lord Tenterden; *Brittain v. Kinnaid*, 1 B. & B. 437, per Dallas, C. J.; 442, 443, per Richardson, J.; *Betts v. Bagley*, 12 Pick. 572, 582, per Shaw, C. J.

(*e*) *Aldridge v. Haines*, 2 B. & Ad. 408, per Parke, J.; 1 St. Ev. 255.

(*f*) *Garnett v. Ferrand*, 6 B. & C. 611, 625, per Lord Tenterden; 9 D. & R. 657, S. C.; *Floyd v. Barker*, 12 Co. 24.

(*g*) 1 B. & B. 432. In *Mould v. Williams*, 5 Q. B. 473, Coleridge, J., observed, "*Brittain v. Kinnaid* has been oftener recognised than almost any modern case."

(*h*) 2 Geo. 3, c. 28; repealed by 2 & 3 Vict. c. 47, § 24.

ship ; and it was asked whether a justice could seize a seventy-four gun vessel, and then justify the illegal detention by describing it in the conviction as a boat. To this it was answered by the Court, that supposing such a thing done, the conviction would still be conclusive, and the party would be without civil remedy, though a decision so gross would undoubtedly be good ground for a criminal proceeding against the justice (i) ; and Richardson, J., observed, " whether the vessel in question were a boat or not, was a fact on which the magistrate was to decide, and the fallacy is in assuming, that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction " (k).

§ 1205. Again, where a justice acting under the Highway Act (l), had issued an order for the removal of certain timber encumbering the highway, and an action of trespass was in consequence brought against him by the owner of the timber, it was held that the plaintiff could not prove, in contradiction to the order, that the place where the wood was lying was no part of the highway (m). So, where two magistrates were sued in trespass for having given the plaintiff's landlord possession of a farm as a deserted farm, under the Act of 11 Geo. 2, c. 19, § 16, the production of the record of their proceedings, which set forth the facts necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, was held to be a conclusive answer to the action, and the plaintiff, consequently, was not permitted to prove that the farm, in point of fact, was not deserted (n). Many other cases might be cited in support of the general proposition, that where (supposing the facts alleged to be true) a magistrate or other judicial personage has jurisdiction, his jurisdiction, and consequent immunity from an action, cannot be made to depend upon the truth or falsehood of those facts, or on

(i) 1 B. & B. 438, 439 ; cited with approbation by Coleridge, J., in *R. v. Buckinghamshire Js.*, 3 Q. B. 809.

(k) 1 B. & B. 442, cited by Lord Denman as an admirable judgment in *R. v. Bolton*, 1 Q. B. 74.

(l) 5 & 6 Will. 4, c. 50, § 73.

(m) *Mould v. Williams*, 5 Q. B. 469.

(n) *Basten v. Carew*, 3 B. & C. 649.

the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them (*o*).

§ 1206. It must be carefully remembered, that this rule *protects justices*, only when acting in a *judicial* capacity. Therefore, if an action of trespass be brought against magistrates for issuing a warrant of distress to enforce payment of a poor-rate, or highway-rate, they will have no defence, should the rate prove invalid; for although the rate must be good in order to give them jurisdiction, yet they cannot judicially decide upon its validity, and the consequence is, that their warrant cannot be any evidence, still less conclusive evidence, of any fact on which the validity of the rate depends (*p*). The same doctrine applies to warrants of distress for borough rates issued by the mayor (*q*).

§ 1207. In many cases a judgment is tendered in evidence, not merely to prove its existence and its legal consequences, or to protect the party who pronounced it against legal proceedings, but in order to *conclude an opponent* upon the *facts determined*; and for this purpose, the rules which govern the admissibility of the record will vary according to the nature of the judgment. Thus, if it be a *judgment in rem*, it will bind all persons whatsoever; and this too, perhaps, although it has not been pleaded (*r*); but if it be a *judgment inter partes*, it will, in general, bind only parties and privies thereto (*s*); and even as against them, it will, as it seems, be evidence only and not conclusive, unless specially pleaded by way of estoppel (*t*).

(*o*) *Cave v. Mountain*, 1 M. & Gr. 257, 262; cited with approbation in *R. v. Bolton*, 1 Q. B. 75. In *re Clarke*, 2 Q. B. 619; *Anon.*, 1 B. & Ad. 382; *R. v. Walker*, 2 M. & Rob. 457, per Coltman, J.; *Gray v. Cookson*, 16 East, 13; *R. v. Hickling*, 7 Q. B. 880.

(*p*) *Mould v. Williams*, 5 Q. B. 476, per Lord Denman; *Weaver v. Price*, 3 B. & Ad. 409; *Morrell v. Martin*, 3 M. & Gr. 593, per Tindal, C. J.; Lord Amherst v. Lord Somers, 2 T. R. 372; *Nichols v. Walker*, Cro. Car. 394.

(*q*) *Fernley v. Worthington*, 1 M. & Gr. 491.

(*r*) See 2 Smith's Lead. Cas. 448; *Hannaford v. Hunn*, 2 C. & P. 155, per Abbott, C. J.; *Magrath v. Hardy*, 4 Bing. N. C. 796, per Tindal, C. J.

(*s*) 2 Smith's Lead. Cas. 439, 441.

(*t*) Ante, § 74. In America the weight of authority is in favour of the conclusiveness of a judgment, when given in evidence, although not pleaded by way

§ 1208. A *judgment in rem* has been *defined* by an able writer to be "an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter, by a tribunal

of estoppel. *Kilheffer v. Herr*, 17 Serg. & R. 325, 326; *Shafer v. Stonebraker*, 4 Gill & J. 345; *Cist v. Zeigler*, 16 Serg. & R. 282; *Betts v. Starr*, 5 Conn. 550, 553; *Preston v. Harvey*, 2 H. & Mun. 55; *Estill v. Taul*, 2 Yerg. 467, 471; *Lawrence v. Hunt*, 10 Wend. 83, 84; *Marsh v. Pier*, 4 Rawle, 288, 289. In this last case the point was briefly but forcibly argued by Kennedy, J., in the following terms: "The propriety of those decisions, which have admitted a judgment in a former suit to be given in evidence to the jury, on the trial of a second suit for the same cause, between the same parties or those claiming under them, but at the same time have held, that the jury were not absolutely bound by such judgment, because it was not pleaded, may well be questioned. The maxim, *Nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa*, being considered, as doubtless it was, established for the protection and benefit of the party, he may therefore waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow, that wherever, on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties or those claiming under them, is properly given in evidence to the jury, it ought to be considered conclusively binding on both Court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, *Expediit reipublicæ ut sit finis litium*, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as seems to be admitted by all that it is, it appears to me that the Court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness. The result, among other things, would be, that the tribunals of the state would be bound to give their time and attention to the trial of new actions for the same causes, tried once or oftener in former actions between the same parties or privies, without any limitation other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally, of other causes, which never have passed in *rem judicatum*. The effect of a judgment of a Court, having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, &c., which may, or may not, be enforced at the election of the other party; because, whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper Court, being the sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered even by the consent of the parties, and is not

having competent authority for that purpose" (u). This definition is given as the best, if not the only intelligible one, to be found in the books; but still, too much reliance must not be placed upon it, as it would seem to include convictions on criminal prosecutions, adjudications on bankruptcy and insolvency, inquisitions in lunacy, inquisitions post mortem, and several other species of judicial decisions, which, if judgments in rem at all, are at least not governed by the same rules of evidence as are generally applicable to adjudications of that nature. For instance, the characteristic quality of a judgment in rem is, that it furnishes, in general, *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties; but this rule does not extend, either to criminal convictions, which are subject to the same rules of evidence as ordinary judgments inter partes (v); or to adjudications of bankruptcy or insolvency, the admissibility and effect of which depend in great measure upon the statute law (x); or to inquisitions in lunacy, inquisitions post mortem, or other inquisitions, which, though regarded as judgments in rem, so far as to be admissible evidence of the facts determined against all mankind, are, for some unexplained reason, considered as not conclusive evidence (y). Thus, it has been repeatedly ruled, that an inquisition in lunacy (z),

only binding upon them, but upon the courts and juries ever afterwards as long as it shall remain in force and unreversed." We have given this decision at length, out of respect for the able judge who pronounced it, but we are bound to confess at the same time, that we do not think it satisfactory. The peace of the community will be little liable to any serious disturbance from the litigious spirit of suitors, so long as one of the litigants has the power, by pleading, to estop his adversary from again controverting a question which has once been solemnly decided; whereas, if judgments recovered were to have a conclusive operation without being pleaded, much useless expense might be incurred, and, consequently, much injustice might be perpetrated, especially in actions against privies; for such persons might not know that any judgment had been recovered against the party, through whom they claim, and might therefore, seeing no intimation of the existence of such judgment on the record, go down to trial, and then, having been taken entirely by surprise and defeated, be compelled to pay a large bill for their own costs, and a larger one for those of their adversary. (u) 2 Smith's Lead. Cas. 439.

(v) R. v. Turner, 1 Moo. C. C. 347; 1 Lew. C. C. 119, S. C.; R. v. Ratcliffe, 1 Lew. C. C. 122; Keable v. Payne, 8 A. & E. 560; Blakemore v. Glamorganshire Can. Co., 2 C. M. & R. 139, per Parke, B., explaining Smith v. Rummens, 1 Camp. 9; and Hathaway v. Barrow, id. 151. Post, § 1223.

(x) See post, §§ 1262—1266.

(y) The Irish Society v. Bp. of Derry, 12 Cl. & Fin. 666.

(z) See 5 & 6 Vict. c. 84; and 8 & 9 Vict. c. 100, § 2.

though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry (*a*); and the same rule has been applied to most other inquisitions (*b*).

§ 1209. Though, for the reasons just given, Mr. Smith's definition of a judgment in rem cannot be regarded as perfect, yet it would be extremely difficult, if not impossible, to enunciate any other, which would be open to fewer objections: Without, therefore, attempting a task, which a long series of unsystematic decisions would render hopeless, it may be deemed sufficient for all practical purposes, if we furnish a tolerably correct *list* of those adjudications which are unquestionably regarded as *judgments in rem*. This list will be found to contain judgments of condemnation of property as forfeited, whether pronounced by the Court of Exchequer (*c*), or by the commissioners or sub-commissioners of excise or customs (*d*);—adjudications in the Court of Admiralty on the subject of prize (*e*);—sentences of divorce *a mensâ et thoro* (*f*);—decrees in matrimonial

(*a*) *Faulder v. Silk*, 3 Camp. 126, per Lord Ellenborough; *Dane v. Kirkwall*, 8 C. & P. 683, per Patteson, J.; *Frank v. Frank*, 2 M. & Rob. 315, 316, n.; *Sargeson v. Sealy*, 2 Atk. 412; *Hume v. Burton*, 1 Ridg. App. Cas. 204; *Den v. Clark*, 5 Halst. 217; *Hart v. Deamer*, 6 Wend. 497.

(*b*) *Stokes v. Dawes*, 4 Mason, 268, per Story, J. In *Jones v. White*, 1 Stra. 68, the Court was divided upon the question, whether a coroner's inquest, finding a person who had destroyed himself lunatic, was admissible at all as evidence of his insanity on an issue on that fact. An inquisition by a sheriff's jury, taken for the purpose of ascertaining to whom goods seized under a *fi. fa.* belong, would seem in general to be wholly inadmissible, as this is not an inquisition under the Queen's writ, but merely a proceeding by the sheriff of his own authority. *Glossop v. Pole*, 3 M. & Sel. 175; *Latkow v. Eamer*, 2 H. Bl. 437.

(*c*) *Geyer v. Aquilar*, 7 T. R. 696, per Lord Kenyon; *Scott v. Shearman*, 2 W. Bl. 977; *Cooke v. Sholl*, 5 T. R. 255.

(*d*) *Maingay v. Gahan*, Ridg. Lapp. & Sch. R. 1, 79; 1 Ridg. App. Cas. 43, 44, n. S. C. There the Irish Exchequer Chamber expressly overruled *Henshaw v. Pleasance*, 2 W. Bl. 1174, a decision which, according to Fitzgibbon, Ch., see R. L. & S. 79, was reprobated by Lord Mansfield in *Dixon v. Cock*, and was frequently condemned by Lord Lifford, Ch. See also, *Roberts v. Fortune*, 1 Hargr. L. Tracts, 468, n., per Lee, C. J.; *Terry v. Huntington*, Hardr. 480; and *Fuller v. Fotch, Carth.* 346, all which cases are also at variance with *Henshaw v. Pleasance*.

(*e*) *Le Caux v. Eden*, 2 Doug. 612, per Buller, J.; *Lindo v. Rodney*, id. 614, per Lord Mansfield.

(*f*) *R. v. Grundon*, 1 Cowp. 322, per Lord Mansfield; *Day v. Spread, Jebb & Bourke*, R. 163.

suits (*g*), but not in suits for jactitation of marriage, unless *perhaps* in cases where the defendant pleads a marriage, and the Court decides on the truth of that plea (*h*);—grants of probate (*i*) and administration (*k*);—sentences of deprivation and expulsion, whether delivered by the Spiritual Court, a visitor, or a college (*l*);—judgments of outlawry (*m*);—adjudications of settlement by an order of justices, whether unappealed against (*n*), or confirmed by a Court of Quarter Sessions on appeal (*o*);—orders of justices for dividing roads under the Act of 34 Geo. 3, c. 64 (*p*);—and perhaps sentences of courts-martial (*q*).

§ 1210. These judgments so far furnish conclusive evidence of the points they decide, not only against the parties who were the actual litigants in the cause, but against all others, that, unless it can be shown, either that the Court had no jurisdiction (*r*), or that the judgment was obtained by fraud or collusion (*s*), no evidence can be admitted, at least in any civil cause (*t*), for the purpose of disproving the facts adjudicated. This rule appears to rest, partly, upon the ground, that in most of the above cases every one who can possibly be affected by the decision is entitled, if he think fit, to appear and assert his own rights, by becoming an actual party to the proceedings (*x*); partly, upon the ground, that judg-

(*g*) *Da Costa v. Villa Real*, 2 Stra. 961; *Bunting's case*, 4 Co. 29; *Kenn's case*, 7 Co. 42. But see *Goodin v. Smith*, Melw. Eccl. Ir. R. temp. Radcliffe, 243—245.

(*h*) *R. v. Duchess of Kingston*, 20 How. St. Tr. 543; 2 Smith's Lead. Cas. 424, 431, 446, S. C.

(*i*) *Noel v. Wells*, 1 Lev. 235, 236; *Allen v. Dundas*, 3 T. R. 125.

(*k*) *Bouchier v. Taylor*, 4 Bro. P. C. 708.

(*l*) *Phillips v. Bury*, 2 T. R. 346, per Lord Holt; *R. v. Grundon*, 1 Cowp. 315, 321, 322, per Lord Mansfield. (*m*) 2 Co. Lit. 352, b.

(*n*) *R. v. Kenilworth*, 2 T. R. 599, per Buller, J.

(*o*) *R. v. Wick St. Lawrence*, 5 B. & Ad. 533, per Lord Denman.

(*p*) *R. v. Hickling*, 7 Q. B. 880.

(*q*) 2 Smith's Lead. Cas. 447. See *R. v. Suddis*, 1 East, 306; *Hannaford v. Hunn*, 2 C. & P. 148; *Grant v. Gould*, 2 H. Bl. 100.

(*r*) Post, § 1236, et seq.

(*s*) *R. v. Duchess of Kingston*, 20 How. St. Tr. 544; 2 Smith's Lead. Cas. 431, 432, S. C. See post, § 1235.

(*t*) As to effect of judgments in rem in criminal trials, see post, § 1214.

(*x*) 1 St. Ev. 286.

ments *in rem* not merely declare the *status* of the subject-matter determined, but, *ipso facto*, render it such as they declare it to be (*z*); and partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society, that the social relations of every member of the community should not be left doubtful; but, after having been clearly defined by one solemn adjudication, should be conclusively set at rest.

§ 1211. Though a judgment in rem is thus binding upon all the world as to the precise point directly decided, and consequently the decision cannot be impeached in the same or another court, by showing that the facts on which it immediately rests are false;—yet, where these facts are themselves put directly in issue in a subsequent suit, the judgment does not, with one exception which will be presently mentioned (*a*), furnish conclusive evidence of their truth, however necessary it may have been for the Court proceeding in rem, to have determined that question before it adjudicated upon the principal point. Thus, although the Ecclesiastical Courts are not authorised to grant letters of administration, unless the intestate be *dead*, yet these letters are so far from being conclusive evidence of the death, when that fact is put in issue in another court, that on one or two occasions they have not been regarded even as *prima facie* proof (*b*). However, in a late case, where the question was whether a child had been born alive or dead, Lord Chancellor Sugden held, that a grant of letters of administration to its effects was a fact from which, in the absence of evidence to the contrary, he was bound to presume that the child was born alive (*c*). Again, though a probate cannot be granted until the Spiritual Court is satisfied of the genuineness of the will, and though, when granted, the title of the executor cannot be impeached in a court of law by showing that the will was forged (*d*), still, if a party be indicted for forging the will, the probate will not be conclusive, if indeed it be *prima facie* evidence in favour of the

(*z*) 2 Smith's Lead. Cas. 439, 440.

(*a*) Post, § 1212.

(*b*) Thompson v. Donaldson, 3 Esp. 63; Moons v. De Bernales, 1 Russ. 301; French v. French, 1 Dick. 268.

(*c*) Reilly v. Fitzgerald, 6 Ir. Eq. R. 349.

(*d*) Noel v. Wells, 1 Lev. 235, 236.

defendant (e). Neither would the production of a probate preclude a party from showing in a common-law court, that the testator was insane at the time when he executed the will, provided the object of this evidence were not to impeach the title of the executor, in which case it would be inadmissible (f). So, in an action for criminal conversation, the plaintiff could not establish the defendant's guilt, by putting in a divorce a mensâ et thoro, granted by the Spiritual Court on account of adultery proved between the plaintiff's wife and the defendant.

§ 1212. An exception to the above rule is recognised in cases, where it appears on the face of the proceedings *in rem* that the fact on which the principal point depended, was itself put *directly in issue*, and was *actually decided* by the Court. Here, if this fact be again controverted between the *same parties*, or persons claiming under them, whether in the same or in a different court, the judgment in rem will be conclusive upon the question. For instance, if, in a suit for administration, the sole question be, which of two parties is next of kin to the intestate, the sentence of the Ecclesiastical Court, declaring, "that, as far as appears by the evidence, the defendant has proved himself next of kin," and that administration shall be granted to him as such, will be conclusive evidence of the relative relationship of the parties in a subsequent suit between them for distribution, whether instituted in the Court of Chancery, or in the Spiritual Court (g). The judgment in such a case would be equally conclusive on the parties, if the question of kindred had been determined by the Court; not as a matter of fact, but as a point of law (h). So, where, on appeal against an order of justices removing three paupers as the children of A. and B., the respondents relied upon a confirmed order for the removal of "A. and *his wife* B." from the respondent to the appellant parish, it was held that the appellants were conclusively estopped by this order, from showing that the children were illegitimate, in consequence of A.

(e) *R. v. Buttery*, R. & R. 342; *R. v. Gibson*, id. 343, (n.), per Lord Ellenborough, overruling *R. v. Vincent*, 1 Stra. 481. (f) *Marriot v. Marriot*, 1 Stra. 671.

(g) *Barrs v. Jackson*, 1 Phill. Ch. R. 582, 587, 588, per Lord Lyndhurst; *Bouchier v. Taylor*, 4 Brown, P. C. 708; *Harg. Law Tracts*, 473, S. C.

(h) *Thomas v. Ketteriche*, 1 Ves. Sen. 333, per Lord Hardwicke, recognised by Lord Lyndhurst in *Barrs v. Jackson*, 1 Phill. Ch. R. 587.

having committed bigamy in marrying B. (i). Indeed, it has been laid down broadly, with respect to orders of removal unappealed against, or confirmed on appeal, that they are not only evidence, but conclusive, as to all the *facts mentioned* in them, and which are *necessary steps* to the decision (k).

§ 1213. In the case of *R. v. Wye* (l), a curious question arose, in consequence of two *conflicting judgments in rem* having been pronounced. A pauper and his wife and their six children were removed by an order of justices, which was confirmed on appeal. Subsequently, the Spiritual Court declared the marriage of these paupers void, on the ground of being incestuous (m). One of the children, born before the date of the order, but not named in it, was afterwards removed to the appellant parish, as the place of his father's settlement. The parish appealed, and relied on the decree of the Ecclesiastical Court; but the respondents urged, on the authority of *R. v. Woodchester* (n), that the former order for removing the parents as man and wife was conclusive evidence of the legitimacy of the present pauper. A case being reserved for the opinion of the Queen's Bench, that Court decided in favour of the appellants, upon the ground that a *new state of facts* had arisen since the former order, the marriage, which at that time was only voidable, having since been declared void by competent authority.

§ 1214. Whether a judgment in rem is conclusive in a *criminal* proceeding is a question which admits of some doubt. In the *Duchess of Kingston's* case, the judges expressed a decided opinion in the negative, urging first, that it would be contrary to public policy, that the temporal courts, in the investigation of a criminal charge, should be bound by a decision perhaps of an ecclesiastical judge, addressed only to the conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision were conclusive in favour of a prisoner, it

(i) *R. v. Woodchester*, Burr. S. C. 191; 2 Stra. 1172, S. C.; *R. v. St. Mary, Lambeth*, 6 T. R. 615.

(k) *R. v. Wye*, 7 A. & E. 770, per Lord Denman.

(l) 7 A. & E. 761.

(m) See now 5 & 6 Will. 4, c. 54.

(n) Burr. S. C. 191; 2 Stra. 1172, S. C.

would be equally binding against him ; and consequently his life, liberty, property, and fame might depend upon the judgment of a court, which had no organs to discover whether he had committed a crime or not (*o*). On the other hand, it has been contended, that this opinion of the judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, it being merely an obiter dictum unnecessary for the decision of the points submitted to them (*p*) ; and then, in answer to the reasons, it is said that nothing can be more inconvenient or dangerous than a conflict of decisions between different courts ; and that if judgments in rem are not regarded as binding upon all courts alike, the most startling anomalies may occur. The authorities reported in the books throw little light upon the subject. *R. v. Buttery* (*q*) is sometimes cited as confirming the opinion of the judges in the *Duchess of Kingston's* case, but in fact it lends little if any support to that opinion ; for the only point there determined was, that, if a party be indicted for forging a will, the mere production of the probate is not conclusive evidence of its validity ; a doctrine which is unquestionably sound law, but which, as we have before stated (*r*), would apply equally to a civil action, provided the object was not to dispute the title of the executor. On the other hand, where the inhabitants of a parish were indicted for not repairing a road, and an order of justices for dividing the road was put in on behalf of the prosecution, the Court held, that, as this order pursued the form given by the Act of 34 Geo. 3, c. 64, it was conclusive of the liability of the defendants to repair the portion of the road allotted to them, and they were consequently not allowed to prove that, in fact, no part of the road ever was within their parish (*s*). This case, however, is one of little authority on the present question, since it was determined, without any reference to the fact of its being an indictment, as coming within the principle of *Brittain v. Kinnaird* (*t*). We may add, that in *R. v. Grundon* (*u*), which was an indictment for an assault upon an undergraduate of Queen's

(*o*) 20 How. St. Tr. 540—543 ; 2 Smith's Lead. Cas. 428—430, S. C.

(*p*) 2 Smith's Lead. Cas. 446, 447.

(*q*) R. & R. 342, cited ante, § 1211.

(*s*) *R. v. Hickling*, 7 Q. B. 880.

(*t*) 1 B. & B. 432.

(*r*) Ante, § 1211.

(*u*) 1 Cowp. 315.

College, Cambridge, in turning him out of the college garden, the production of a sentence of expulsion was held to constitute a conclusive defence.

§ 1215. With respect to judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, these, with one exception, are not admissible either for or against *strangers* in proof of the facts adjudicated. They are not admissible against them, because it is an obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; or, to express the same sentiment in technical language, *res inter alios acta alteri nocere non debent* (*x*); and they cannot be received in their favour even as against a party thereto, because it is thought that the previous rule would work injustice, unless its operation were mutual (*y*). The *exception* just stated is allowed in favour of verdicts, judgments, and other adjudications upon subjects of a *public nature*, such as customs (*z*), prescriptions (*a*), tolls (*b*), boundaries between parishes, counties, or manors (*c*), rights of ferry (*d*), liabilities to repair roads (*e*) or sea-walls (*f*), modusses (*g*), and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications, which for this purpose are regarded as a species of reputation, will also be received, and this too, whether the parties in the second suit be those who litigated the first, or be utter strangers (*h*). The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive (*i*).

(*x*) B. N. P. 232.

(*y*) Co. Lit. 352 a, cited and approved of in *Gaunt v. Wainman*, 3 Bing. N. C. 70, per Tindal, C. J.; and in *Doe v. Errington*, 6 Bing. N. C. 83, per id., ante, § 80; post, § 1222.

(*z*) *Reed v. Jackson*, 1 East, 357, per Lord Kenyon; *Berry v. Banner*, Pea. R. 156.

(*a*) Id.

(*b*) B. N. P. 233.

(*c*) *Brisco v. Lomax*, 8 A. & E. 198; *Evans v. Rees*, 10 A. & E. 151, 153.

(*d*) *Pim v. Curell*, 6 M. & W. 234; *Hemphill v. M'Kenna*, 8 Ir. Law R. 43.

(*e*) *R. v. St Pancras*, Pea. R. 220.

(*f*) *R. v. Leigh*, 10 A. & E. 398.

(*g*) *Croughton v. Blake*, 12 M. & W. 205, 209.

(*h*) Cases cited in last seven notes; ante, §§ 429—431.

(*i*) *Reed v. Jackson*, 1 East, 357; *Croughton v. Blake*, 12 M. & W. 205.

§ 1216. Though a judgment *inter partes* is thus seldom admissible, and never conclusive evidence of the facts adjudicated, either for or against strangers, it is always admissible for or against *parties* or *privies*, where the same subject-matter is a second time in controversy between the same persons, or parties claiming under them (*i*). It is not, indeed, even in these cases, absolutely conclusive of the rights in dispute, unless it be pleaded as matter of estoppel (*k*); but still, it furnishes highly cogent evidence, which cannot be disregarded by a jury, excepting upon good and substantial grounds (*l*). The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.

§ 1217. Under the term *parties* in this connexion, the law includes *all* those who are *individually named in the record*, and who are consequently entitled to prosecute or defend the cause, to adduce testimony, to cross-examine witnesses called on the other side, and to appeal from the judgment, should an appeal be allowable by law (*m*). A *prochein amy* is not such a party, being considered simply as a person appointed by the Court to look after the interests of the infant, and to manage the suit for him (*n*); but the infant himself is a party, and will, consequently, be bound by the judgment in any action brought in his name by his *prochein amy* duly appointed, even though the suit may have been instituted and conducted without his authority or knowledge (*o*). Neither will the law, in such a case, recognise any distinction between infants of tender and of mature years; and therefore, where the wife of a minor committed adultery, whilst her husband

(*i*) *Duchess of Kingston's case*, 20 How. St. Tr. 538; B. N. P. 232; *Ferrers v. Arden*, 6 Rep. 7; Cro. Eliz. 668, S. C.

(*k*) Ante, § 74.

(*l*) *Outram v. Morewood*, 3 East, 365, per Lord Ellenborough.

(*m*) *Duchess of Kingston's case*, 20 How. St. Tr. 538, n.; 2 Smith's Lead. Cas. 425, S. C.

(*n*) *Sinclair v. Sinclair*, 13 M. & W. 640.

(*o*) *Morgan v. Thorne*, 7 M. & W. 400.

was abroad in the East Indies, and the father, having procured himself to be appointed *prochein amy*, commenced an action for criminal conversation in his son's name, but without his knowledge, the Court held that the son would be bound by the judgment in this action (*p*). But if a person *sui juris* be made a party to a suit without his knowledge or consent, he will not be bound by the proceedings; and therefore, where a defendant, on being sued for a debt, paid it to the attorney, who was suing him in the name, but without the authority, of the creditor, it was held that this payment did not discharge him (*q*). In cases of this nature, the defendant should apply to the Court, who will stay the proceedings, and compel the attorney to pay the costs incurred in the defence (*r*).

§ 1218. Whether the term *parties* will also include persons not named in the record, but in *whose immediate and individual behalf the action has been brought or defended*, may admit of some doubt. It has been said that the case of *Kinnersley v. Orpe* (*s*) has decided this point in the affirmative (*t*); but it is submitted that this is a mistake. That was an action brought to recover penalties from a servant of one Cotton for fishing in the plaintiff's fishery. The plaintiff, in support of his right to the fishery, produced no other proof than the record of a verdict and judgment recovered by him against another servant of Cotton, in a former action for a trespass committed in the same fishery. In both actions the servants justified as acting by the orders of their master, who claimed a right to the fishery in question. The judge at Nisi Prius, considering Cotton as the real defendant in both actions, held the record to be conclusive, and directed the jury to find for the plaintiff, which they did. A new trial was, however, subsequently granted, the Court intimating that the record, though admissible evidence, was not conclusive. As no reasons

(*p*) *Morgan v. Thorne*, 7 M. & W. 400.

(*q*) *Robson v. Eaton*, 1 T. R. 62.

(*r*) *Hubbart v. Phillips*, 13 M. & W. 702.

(*s*) 2 Doug. 517.

(*t*) Thus, in *Simpson v. Pickering*, 1 C. M. & R. 529, Alderson, B., observes, as an obiter dictum, "*Kinnersley v. Orpe* shows that the verdict may be given in evidence, where the parties are *really* the same." See also 2 Ph. Ev. 7; and *Doe v. E. of Derby*, 1 A. & E. 791, per Littledale, J.

are given for this opinion, the case would be one of little authority, even had it never been questioned; but its value becomes much less when we find, that Lord Ellenborough, while commenting upon it in his well-considered judgment in *Outram v. Morewood* (u), expresses his astonishment that it should ever for a moment have been supposed, that there could be an estoppel in such a case; and then, in the shape of a doubt, intimates a tolerably clear opinion, that the record was wholly inadmissible, as the defendant was no party to the former action. However, thus much is established, that the lessor of the plaintiff in ejectment must be regarded as a party to that action; and, consequently, the judgment pronounced therein will be evidence either for or against him, in any subsequent action between himself and the former defendant, respecting the same property, whether in ejectment or for mesne profits (x). So, the landlord, or other person, in whose right a defendant in replevin has made cognizance, has been held to be a party to that suit (y); and it would certainly be convenient and reasonable if the rule, in conformity with that which governs admissions (z), and the competency of witnesses (a), were extended to all persons who were *substantially* parties to the former action. Indeed, it is highly probable, notwithstanding the absence of direct authority, that the Courts would now determine in favour of such extension, and the more so, as beyond all doubt, the rule applies to every person who claims under the original parties, or in privity with them.

§ 1219. We have already seen, that the term *privity* denotes mutual or successive relationship to the same rights of property; and the reason why persons standing in this relation to the litigating party can rely upon, and are bound by, the proceedings, to which he was a party, is, that they are identified with him in interest (b). Hence all privies, whether in blood, in estate, or in

(u) 3 East, 366. See *Case v. Reeve*, 14 Johns. 81, 82.

(x) *Doe v. Huddart*, 2 C. M. & R. 316; 5 Tyr. 846, S. C.; *Doe v. Seaton*, 2 C. M. & R. 728, 732; *Wright v. Doe d. Tatham*, 1 A. & E. 19; B. N. P. 232; *Graves v. Joice*, 5 Cowen, 261.

(y) *Hancock v. Welsh*, 1 Stark. R. 347.

(z) Ante, § 536.

(a) Ante, § 974.

(b) Ante, §§ 73, 558.

law, are estopped themselves, and can estop others, from litigating that, which would be conclusive either against or in favour of him, with whom they are in privity (*c*). Thus, a verdict and judgment for or against the ancestor may be pleaded in bar, or will furnish cogent evidence, for or against the heir, the tenant in dower, the tenant by the curtesy, the legatee, the devisee, or any other person claiming under the ancestor (*d*). So, if several successive remainders are limited in the same deed, a judgment for one remainder-man is evidence for the next in succession (*e*). A judgment of ouster in a quo warranto, against the incumbent of an office, is conclusive against those who derive their title to office under him (*f*). So, an executor or administrator will be bound by a verdict recovered against the testator or intestate (*g*); a husband and wife will be bound by a verdict recovered against the wife before her marriage (*h*); and the same rule will apply to all grantees, mortgagees, and assignees, provided their title has accrued *since* the judgment was pronounced (*i*).

§ 1220. Where a man brought an action against several persons for diverting water from his works, and had judgment; and afterwards he and another sued the same defendants for a similar injury to the same works; the former judgment was held to be cogent evidence for the plaintiffs, their privity in estate with the former plaintiff being presumed by the Court from the fact that they were in possession of the property (*k*). In that case it was objected to the admissibility of the judgment, that one of the plaintiffs had himself been a witness for the other in the former suit, when he was disinterested; but the Court

(*c*) Ante, § 73.

(*d*) *Lock v. Norborne*, 3 Mod. 141; *Outram v. Morewood*, 3 East, 346.

(*e*) *Pyke v. Crouch*, 1 Lord Raym. 730; B. N. P. 232; *Doe v. Tyler*, 6 Bing. 390.

(*f*) *R. v. Mayor of York*, 5 T. R. 66, 72, 76; *R. v. Hebden*, 2 Selw. N. P. 1180, 1181; 2 Stra. 1109, S. C.

(*g*) *R. v. Hebden*, Andr. 389.

(*h*) *Outram v. Morewood*, 3 East, 346.

(*i*) *Doe v. E. of Derby*, 1 A. & E. 790, per Littledale, J.; *Doe v. Webber*, 1 A. & E. 119; *Adams v. Barnes*, 17 Mass. 365.

(*k*) *Blakemore v. Glamorganshire Can. Co.*, 2 C. M. & R. 133, 139; *Strutt v. Bovingdon*, 5 Esp. 58, 59, per Lord Ellenborough.

overruled the objection, giving the following sensible reason for their decision :—"The case being brought within the general rule, that a verdict on the matter in issue is evidence for or against parties and privies, no exception can be allowed in the particular action, on the ground that a circumstance occurs in it, which forms one of the reasons why verdicts between different parties are held to be inadmissible ; any more than the absence of all such circumstances in a particular case, would be allowed to form an exception to the general rule, that verdicts between other parties cannot be received. It is much wiser, and more convenient for the administration of justice, to abide as much as possible by general rules " (l).

§ 1221. In all the instances of privity above given, the privy has claimed, or been liable, *under or through* the original party ; but the same rules of law apply, where two or more persons are subject to a *joint* or *concurrent* liability. For instance, if one be sued alone upon a *joint* note, debt, or tort, and he waive his plea in abatement, the judgment against him, even *without satisfaction*, may be pleaded and proved in bar of a second suit for the same cause of action, whether it be brought against the other debtor or wrong-doer, or against the joint debtors or wrong-doers ; because, in these cases, the original cause of action has been changed into matter of record, which is of a higher nature, and the inferior remedy is thus merged in the higher (m). So, where a party has concurrent, that is, joint and several remedies against several persons, and has obtained *satisfaction* upon a judgment against one, he will be estopped from proceeding against the others ; for, if this were not so, he might recover damages twice over for the same cause of action, which would be repugnant to natural justice (n). So, if an action on a joint contract or trespass be

(l) 2 C. M. & R. 139, per Parke, B.

(m) *King v. Hoare*, 13 M. & W. 494, 504 ; 2 Dowl. & L. 382, S. C. ; *Lechmere v. Fletcher*, 1 Cr. & Mee. 634, per Bayley, B. ; *Brown v. Wootton*, Yelv. 67 ; *Cro. Jac.* 73 ; *Moor*, 762, S. C. ; *Ward v. Johnson*, 13 Mass. 148. These cases overrule a dictum of Lord Tenterden's in *Watters v. Smith*, 2 B. & Ad. 892, and *Sheehy v. Mandeville*, 6 Cranch, 253, 265.

(n) *Bird v. Randall*, 3 Burr. 1345, 1353 ; *King v. Hoare*, 13 M. & W. 496, 505, per Parke, B. ; *Lechmere v. Fletcher*, 1 Cr. & Mee. 623, 634, 635, per Bayley, B. ; *U. S. v. Cushman*, 2 Sumn. R. 426, 437—441, per Story, J. ; *Farwell v. Hilliard*, 3 N. Hamp. 318. See *Godson v. Smith*, 2 Moore, 157.

brought against two defendants, it seems that one of them may plead in abatement the pendency of another action against him for the same cause (*o*); but if A. be sued on a contract, the pendency of an action against B. for the same cause cannot be pleaded in abatement, for in such case A. is not twice vexed; and his proper course, therefore, is either to plead the non-joinder of B., if B. is within the jurisdiction, or to appeal to the equitable authority of the Court for a stay of proceedings (*p*). Upon a somewhat similar principle, if a judgment has been recovered, and execution executed, against a garnishee in a suit of *foreign attachment*, he may rely on these facts as an estoppel, should any subsequent action be brought against him by the defendant in such suit, for the monies paid by him to the defendant's creditor under the process of the Tolzee or Mayor's Court (*q*).

§ 1222. In order to prevent this rule, which renders judgments inter partes conclusive of the facts adjudicated as between parties and privies, from working injustice, it has been deemed essential, as before stated (*r*), that its operation should be *mutual*. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either. For, if the party relying on the judgment was not also a party to the suit in which it was pronounced, it may have been obtained upon his own testimony, in which case, to allow him to derive a benefit from it would be unjust (*s*); and, on the other hand, it would be no less unjust to conclude him by proceedings, over the conduct of which he had no control, and which might have been collusively carried on by the actual parties, for the very purpose of fixing a liability upon him. Though these are the reasons usually given for the original

(*o*) *E. of Bedford v. Bp. of Exeter*, Hob. 137; *Rawlinson v. Oriel*, 1 Show. 75; Carth. 96; *Henry v. Goldney*, 15 M. & W. 499, per Alderson, B.

(*p*) *Henry v. Goldney*, 15 M. & W. 494, overruling a dictum of Lord Ellenborough in *Boyce v. Douglas*, 1 Camp. 60. *Newton v. Hunt*, 7 C. B. 675, where two

(*q*) *Magrath v. Hardy*, 4 Bing. N. C. 782; *Huxham v. Smith*, 2 Camp. 19, per Lord Ellenborough; *Crosby v. Hetherington*, 4 M. & Gr. 933; *M'Daniel v. Hughes*, 3 East, 367; *Philips v. Hunter*, 2 H. Bl. 402, 410; *Hull v. Blake*, 13 Mass. 153; *Holmes v. Remsen*, 20 Johns. 229.

(*r*) Ante, §§ 80, 1215.
(*s*) *Smith v. Rummens*, 1 Camp. 9; *Hathaway v. Barrow*, id. 151; *Wood v. Davis*, 7 Cranch, 271; *Davis v. Wood*, 1 Wheat. 6.

actions having been brought against two joint contractors in respect of the same demand, and the debt is costs in one which having been paid, held that a Judge at Chambers might stay the proceedings in the other action without costs.

introduction of the rule requiring mutuality, yet the rule being once established, it requires no support from these reasons; and therefore, though a case should occur, in which it could be proved to demonstration, that a stranger relying on a judgment had not influenced the decision in the most remote degree, either as a witness, or in any other way, no exception in his favour would in consequence be allowed (*u*).

§ 1223. In conformity with this rule it has been determined that a judgment in a criminal prosecution cannot be given in evidence in a civil action, to establish the truth of the facts, on which it was rendered (*x*); neither can a judgment in a civil action be given in evidence for such a purpose in a criminal prosecution (*y*). So, the record of the conviction of a principal cannot be received as evidence of his guilt on the trial of a subsequent indictment against the accessory (*z*). However, where a prisoner was indicted for the substantive offence of receiving stolen goods, and a witness for the Crown, after confessing that he was himself the thief, admitted on cross-examination, that he had been tried and acquitted of the theft; the Irish judges held, that the acquittal of the principal, though not conclusive evidence of his innocence, was a fact which it was right to leave to the jury, together with the fact of his subsequent confession in court (*a*). Again, a verdict for or against a tenant for life, will not be evidence for or against the reversioner, because the reversioner does not claim through the tenant for life, but enjoys an independent title (*b*). So, if a man

(*u*) *Blakemore v. Glamorganshire Can. Co.*, 2 C. M. & R. 139, per Parke, B.; ante, § 1219.

(*x*) *Smith v. Rummens*, 1 Camp. 9; *Hathaway v. Barrow*, id. 151; both which cases are explained by Parke, B., in 2 C. M. & R. 139; *Jones v. White*, 1 Stra. 68, per Eyre and Pratt, Js.; B. N. P. 233; *Hillyard v. Grantham*, cited by Lord Hardwicke in *Brownsword v. Edwards*, 2 Ves. Sen. 246; *Gibson v. McCarty*, Cas. temp. Hardw. 311; *Wilkinson v. Gordon*, 2 Add. 152, per Sir Jn. Nicholl; *Jameson v. Leitch*, Milw. Eccl. Ir. R. temp. Radcliffe, 690.

(*y*) See *R. v. Duchess of Kingston*, 20 How. St. Tr. 471, 485.

(*z*) *R. v. Turner*, 1 Moo. C. C. 347; 1 Lew. C. C. 119, S. C.; *R. v. Ratcliffe*, 1 Lew. C. C. 122, per Parke, J.; *Keable v. Payne*, 8 A. & E. 560, per Patteson, J.; *R. v. Smith*, 1 Lea. C. C. 288. These cases do not directly establish the proposition in the text; but its soundness is clear on principle, unless a conviction be a judgment in rem, which it is submitted it is not.

(*a*) *R. v. McCue*, 1 Jebb, C. C. 120.

obtain a judgment against a lessee, he cannot, it is submitted, notwithstanding some authorities to the contrary (c), avail himself of it in a subsequent action against the lessor (d).

§ 1224. It is true that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a *solemn admission* by such party in a judicial proceeding, with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case, not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself, that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs (e). Thus, where a carrier brought trover against a person, to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for the owner, in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had the plaintiff's goods (f). So, a record of judgment in a criminal case, upon a *plea of guilty*, is admissible in a civil action against the party, as a solemn judicial confession of the fact (g).

§ 1225. In order that a judgment should bind parties and privies, it must have *directly decided the point* which is *in issue* in the *second suit* (h); and therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the opposite party is always at liberty to deny on the record, or at the trial, that it has settled the rights of the parties as to the same cause of action, which is now in controversy; and the question of identity thus raised, must be determined by the jury upon the evidence adduced. The due

(b) B. N. P. 232.

(c) Com. Dig. Ev. A. 5; 2 Ph. Ev. 11. The passage in Comyn seems to apply to the old action of *ejectione firmæ*.

(d) Rees v. Walters, 3 M. & W. 527; Rushworth v. Countess of Pembroke, Hardr. 472. (e) Ante, §§ 547, 555, 583.

(f) Tiley v. Cowling, 1 Lord Raym. 744, per Holt, C. J.; B. N. P. 243, S. C.; Robison v. Swett, 3 Greenl. 316.

(g) Anon. per Wood, B., cited 2 Ph. Ev. 25; Bradley v. Bradley, 2 Fairf. 367.

(h) Ricardo v. Garcias, 12 Cl. & Fin. 368.

determination of this question will require a careful examination of the issues raised in the two actions ; for while, on the one hand, it is not necessary that the actions should be in the same *form*, provided the facts in issue are really the same ; so, on the other, it is not sufficient that the *writs* should be *identical*, if the issues raised by the pleadings are different. For instance, if one wrongfully take another's horse and sell him, applying the money to his own use, a recovery in trespass, in an action by the owner for the taking, would be a bar to a subsequent action of assumpsit for the money received, or for the price, the cause of action being proved to be the same (*h*). So, a verdict for the defendant in trover, on a plea denying the plaintiff's title, is a bar to an action of assumpsit for the money arising from the sale of the same goods (*i*). So, a verdict for the defendant in replevin, where, to an avowry for rent the plaintiff had pleaded non tenuit, has been held to conclude the plaintiff, when subsequently sued by the party under whom the plaintiff in replevin had made cognizance, for the rent which had accrued at the time of the distress (*k*). So, where to debt on bond, the defendant pleaded usury, a verdict of acquittal in an action for penalties for usury on the same bond, between the same parties, was held to be admissible in evidence for the plaintiff (*l*).

§ 1226. But, if an action on the case were brought for obstructing a watercourse, and the plaintiff were to obtain a verdict on the mere plea of not guilty, this would not preclude the defendant from disputing the plaintiff's right to the watercourse, should he bring a second action against the defendant for a subsequent obstruction (*m*). So, if, to an action for trespassing on a close, whether described by abuttals or name, the defendant plead *liberum tenementum*, and obtain a verdict, this record

(*h*) 17 Pick. 13, per Putnam, J. ; *Young v. Black*, 7 Cranch, 565 ; *Livermore v. Herschell*, 3 Pick. 33. Whether parol evidence would be admissible, in such case, to prove that the damages awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence had been offered ; *quære*, and see *Loomis v. Green*, 7 Greenl. 386.

(*i*) *Hitchin v. Campbell*, 2 W. Bl. 827, 831, 832 ; 3 Wils. 304, S. C.

(*k*) *Hancock v. Welsh*, 1 Stark. R. 347.

(*l*) *Cleve v. Powel*, 1 M. & Rob. 228, per Lord Denman.

(*m*) *Evelyn v. Haynes*, per Lord Mansfield, cited and explained by Lord Ellenborough in *Outram v. Morewood*, 3 East, 365.

will not, of itself, estop the plaintiff from bringing a second action, for a trespass committed on the same close ; for, as to support this plea it is not necessary for the defendant to prove his title to the *whole* close, but it will suffice if he can show that the *part* of the close on which the trespass was committed belongs to him, it follows that the only effect of the record in a subsequent action between the same parties, or those claiming under them, will be to prove, that *some* part of the close is the defendant's property ; and this will not bar the plaintiff's right, unless it can be further shown, that the trespasses in the two actions were committed in the same part (*n*).

§ 1227. It matters not, in regard to the conclusive effect of a judgment, whether the plaintiff in the second action was the plaintiff or defendant in the first, provided the *point in dispute* be *the same* in both suits. Therefore, if an action be brought for goods sold and delivered with a warranty, or for work and labour agreed to be done, or for goods agreed to be supplied, according to a contract, and the defendant elect to show, as he may do, how much less the subject-matter of the action was worth, by reason of a breach of the warranty or contract ; he will be considered as having obtained satisfaction for the breach, to the extent that he obtained, or was capable of obtaining, an abatement of price on that account ; and to that extent, but no more, he will be precluded from recovering in another action (*o*). So, a verdict negating any right which a defendant sets up in his plea, will estop him from asserting that right as plaintiff in a subsequent action against his former opponent (*p*). For instance, if, to an action of assumpsit or debt, the defendant plead a set-off, and the issue thereon be found against him, he cannot afterwards sue the plaintiff for the demand specified in that plea (*q*). The application of this rule to pleas of set-off, even when coupled with the further rule that such pleas cannot be taken distributively, does not, in practice,

(*n*) *Smith v. Royston*, 8 M. & W. 386—388, per Alderson, B.

(*o*) *Mondel v. Steel*, 8 M. & W. 858, 871, 872. See *Thornton v. Place*, 1 M. & Rob. 218.

(*p*) 2 *Smith's Lead. Cas.* 442.

(*q*) *Eastmure v. Laws*, 5 Bing. N. C. 444 ; 7 Scott, 461 ; 7 Dowl. 431, S. C.

promote to any great extent the multiplicity of suits; for, although the issue on a plea of set-off, if pleaded to the whole declaration, cannot be found for the defendant, unless in connection with the other pleas, it covers the whole cause of action (n); and although, if the set-off be pleaded to part of the demand, the defendant will not have a *verdict*, unless he can prove his claim to the whole of such part (o); yet, inasmuch as the amount of any claim he may establish under his plea, will be *allowed him in reduction of damages* (p), there is seldom any sufficient reason why, rather than plead a set-off, he should elect to proceed by a cross action. However, this course may occasionally be advisable, in order to avoid the risk of paying costs on the set-off.

§ 1228. In applying this rule to *cross actions*, care must be taken to distinguish between cases, where the points in issue are identical, and those, where both suits *merely relate to the same transaction or property*. In the latter case, the recovery of a verdict by the plaintiff in one action will not estop the defendant from bringing a subsequent action against him. Thus, where the purchaser of a kitchen range, on being sued for the stipulated price, paid 40*l.* into court, which the maker took out in satisfaction of the cause of action; it was held that the purchaser was not estopped thereby from suing the maker for negligence in the construction of the range (q). So, it frequently happens in running down cases, that both parties commence proceedings against each other; and as a verdict on the first trial is no evidence on the second, juries occasionally find verdicts in favour of both plaintiffs, in order, as it would seem, to illustrate the humiliating doctrine that no human institutions are perfect.

§ 1229. A convenient and safe *test* for ascertaining whether or not the judgment in one action should be a bar to another, is to consider *whether the same evidence would or would not sustain*

(n) *Tuck v. Tuck*, 5 M. & W. 109; *Kilner v. Bailey*, id. 382; *Moore v. Butlin*, 7 A. & E. 595; 2 N. & P. 436, S. C.; *Wood v. Peyton*, 13 M. & W. 33, per Alderson and Rolfe, Bs.

(o) See *Tuck v. Tuck*, 5 M. & W. 110, 111

(p) *Rodgers v. Maw*, 15 M. & W. 444.

(q) *Rigge v. Burbidge*, 15 M. & W. 598; 4 Dowl. & L. 1, S. C.

both (r). But if the declarations be framed in such a manner, that the causes of action *may* be identical in the two suits, the party bringing the second action must show that they are not the same, for he has no right to leave the question of identity to be determined, on a nice investigation of the facts and pleadings (s). In one case, indeed, where the plaintiff, in a former action, declared upon a promissory note, and for goods sold, but, upon executing the writ of inquiry after judgment by default, was not prepared with evidence on the count for goods sold, and therefore took his damages for the amount only of the note; he was permitted, in a second action, for the goods sold, to prove this fact by parol, and the judgment was held no bar to the second action (t). In another case, too, a plaintiff declared in debt for use and occupation of a farm, with the usual money counts, and in his particulars of demand claimed a certain sum for the value of stone taken from a quarry on the farm. At the trial he confined his evidence to the count for use and occupation, and obtained a general verdict. Before this action was tried, the plaintiff brought another against the same defendant for quarrying and taking away stone; and the Court held, on the trial of the action on the case, that the tort was not waived by the plaintiff's abandonment of his claim for the value of the stone as stated in the particulars, and that, consequently, the second action was maintainable notwithstanding the former recovery (u). On the other hand, it has been laid down as a general rule, which is recognised alike in courts of law and of equity, that "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which

(r) *Hitchin v. Campbell*, 2 W. Bl. 831, per De Grey, C. J.; *Martin v. Kennedy*, 2 B. & P. 71, per Lord Eldon.

(s) *Lord Bagot v. Williams*, 3 B. & C. 239, per Abbott, C. J.; *Seddon v. Tutop*, 6 T. R. 609, per Lord Kenyon.

(t) *Seddon v. Tutop*, 6 T. R. 607; recognised by Bayley, J., in *Lord Bagot v. Williams*, 3 B. & C. 240; and by Best, C. J., in *Thorpe v. Cooper*, 5 Bing. 129.

(u) *Hadley v. Green*, 2 Tyrw. 390. See acc. *Bridge v. Gray*, 14 Pick. 55; *Webster v. Lee*, 5 Mass. 334; *Phillips v. Berrick*, 16 Johns. 136.

was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" (x).

§ 1230. Many cases in Chancery might be cited in illustration of the above rule (y), but it will suffice to refer to a few common-law decisions connected with this subject. Thus, it has been determined, that if a plaintiff obtains an interlocutory judgment for his whole claim, but afterwards, to avoid delay, takes a rule to compute on one item only, and enters a *nolle prosequi* as to the others, this will bar any future action for the last-mentioned items; a *nolle prosequi* as to part, entered up after judgment for the whole, being equivalent to a *retraxit* (z). A fortiori, if a plaintiff, having several causes of action, fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless he elects to be non-suited generally, or can induce the Court to set aside the verdict he has obtained (a). So, if he sues for part only of an indivisible claim, as if one serves another for a year under the same hiring, and then brings an action for a month's wages, it is a bar to the whole (b). Upon the same principle, if a plaintiff, knowing that he has an unliquidated claim against a defendant for a large amount, chooses to sue him in an inferior court for a less sum than is due; or if, having a demand for 60*l.*, in three sums of 20*l.*, he consents at *Nisi Prius* to take a verdict for 40*l.*, he cannot afterwards bring a second action for the residue (c). So, if all matters in difference between two parties are referred, and one of them declines to bring

(x) *Henderson v. Henderson*, 3 Hare, 115, per Wigram, V. Ch.

(y) *Farquharson v. Seton*, 5 Russ. 45; *Partridge v. Osborne*, id. 195; *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 718, per Lord Eldon; *M. of Bredalbane v. M. of Chandos*, 2 Myl. & Cr. 732, 733, per Lord Cottenham.

(z) *Bowden v. Horne*, 7 Bing. 716.

(a) *Stafford v. Clark*, 2 Bing. 382, per Best, C. J.

(b) *Miller v. Covert*, 1 Wend. 487.

(c) *Lord Bagot v. Williams*, 3 B. & C. 235, 241.

before the arbitrator some claim which is included within the scope of the reference, he cannot make this claim the subject of a fresh action (*d*).

§ 1231. The rule requiring an *identity* in the *points at issue*, but allowing a *diversity in the forms* of proceeding, has hitherto been illustrated by referring to cases, where a judgment recovered in one action has, or has not, been regarded as a bar to a second action. The same doctrine, however, will be found to prevail in *criminal prosecutions*; and therefore, although, in order to warrant a prisoner in pleading *autrefois acquit*, or *autrefois convict*, the form of the two indictments, or even the nature of the charges need not be identical, yet, unless the first indictment were one, upon which the prisoner might have been convicted by proof of the facts necessary to support the second indictment, an acquittal or conviction on the first trial will be no bar to the second. Thus, if a prisoner, indicted for burglariously breaking and entering a house and stealing the goods of A. be acquitted, he cannot plead this acquittal in bar of a subsequent indictment, for burglariously breaking and entering the same house, and stealing the goods of B. (*e*). Neither will his acquittal on a charge of burglary and stealing, avail him on an indictment for burglary with intent to steal (*f*). So, an acquittal for the larceny of goods would seem to be no bar to an indictment for obtaining the same goods under false pretences; but this point is not free from doubt, as under the Act of 7 & 8 Geo. 4, c. 29, § 53, the prisoner might be convicted of the misdemeanor, though the evidence were to establish the fact, that a larceny had been committed (*g*). So, notwithstanding some old authorities to the contrary (*h*), it is now finally determined, that an acquittal on an indictment, charging the prisoner

(*d*) *Smith v. Johnson*, 15 East, 213; *Dunn v. Murray*, 9 B. & C. 780, 788. See *Ravee v. Farmer*, 4 T. R. 146.

(*e*) Per Buller, J., delivering the opinion of all the Judges in *R. v. Vandercomb*, 2 Lea. C. C. 718, 719, and overruling *Turner's case*, Kel. 30, and *Jones & Beaver's case*, Kel. 52.

(*f*) *R. v. Vandercomb*, 2 Lea. C. C. 716—721.

(*g*) See *R. v. Henderson*, 2 Moo. C. C. 192, 198, 199.

(*h*) 1 Hale, P. C. 626; 2 Hale, P. C. 244; *Foster C. Law*, 361; 2 *Hawk. P. C.* c. 35, § 11; Kel. 25.

with having been present aiding and abetting in a felony, is no bar to an indictment against him as an accessory before the fact (*i*). So, where two or more persons have committed successive rapes upon the same woman, though one of them be acquitted when charged as a principal in the first degree, he may still be indicted for being present aiding and abetting the others to commit the crime (*j*). So, although a prisoner be acquitted of receiving stolen goods from A. B., knowing them to have been *so* feloniously stolen, he may still, as it seems, be indicted for the substantive felony of receiving stolen property, with a guilty knowledge; and the record of his former acquittal will not avail him, unless it be proved that the goods, if received by him at all, were received from A. B., by whom they were taken from the original owner (*k*). So, if an insolvent debtor be indicted for omitting certain goods out of his schedule, his acquittal or conviction will be no bar to a second prosecution against him for omitting other goods, though as such a course of proceeding savours of oppression, it would, under ordinary circumstances, be discountenanced by the judge (*l*). In all these cases, and in many others of a similar nature, the prisoner could not by possibility have been legally convicted on the first indictment of the offence charged in the second; and therefore the ancient maxim of the common law, that no man shall be twice brought into jeopardy for the same crime, is in no respect contravened by the second trial.

§ 1232. On the other hand, no person tried for obtaining money by false pretences is liable to be afterwards prosecuted for larceny upon the same facts (*m*), because, as we have just seen, he may be convicted of the misdemeanor, though a larceny be proved. So, if a prisoner be indicted for a compound crime, and be wholly acquitted, he cannot be afterwards charged with any offence included in such crime; because, in these cases, the prisoner, though acquitted of the more serious charge, might still,

(*i*) *R. v. Birchenough*, 1 Moo. C. C. 477; S. C. nom. *R. v. Plant*, 7 C. & P. 575.

(*j*) See *R. v. Parry*, 7 C. & P. 836.

(*k*) *R. v. Woolford*, 1 M. & Rob. 384, per Patteson, J.; *R. v. Dann*, 1 Moo. C. C. 424.

(*l*) *R. v. Champneys*, 2 M. & Rob. 26, per Patteson, J.; 2 Lew. C. C. 52, S. C.

(*m*) 7 & 8 Geo. 4, c. 29, § 53.

on the first indictment, have been found guilty of the lighter offence. For instance, if one has been acquitted on an indictment for murder, he is protected against a second prosecution for manslaughter (*n*) ; and indeed, if a party be charged with any felony including an assault against the person, and be wholly acquitted, he cannot be subsequently indicted for the assault, since, on the first indictment, the jury may now acquit of the felony, and find a verdict of guilty of the assault, if the evidence shall warrant such finding (*o*). So, if a person be indicted for robbery, for stealing in a dwelling-house, for burglary in breaking into a house and stealing goods, or for stealing from the person, and be generally acquitted, the acquittal will be a bar to any future indictment for the simple larceny (*p*).

§ 1233. It seems, too, that the converse of this rule holds good ; and therefore, if a prisoner be acquitted or convicted of manslaughter, of simple larceny, or even of an assault, he cannot afterwards be indicted for the murder of the same person (*q*), or for compound larceny with respect to the same property (*r*), or for any crime involving the same assault (*s*). So far has this doctrine been carried, that a conviction by justices for a common assault and battery under 9 Geo. 4, c. 31, § 27, has been held to be a bar to an indictment for feloniously stabbing with intent to maim, where it appeared that both charges related to one and the same transaction (*t*) ; and where a prisoner was acquitted of the murder of A., and was afterwards indicted for burglary in his house, Mr. Baron Parke observed, that had the indictment contained an allegation that the burglary had been accompanied with violence to A., the former acquittal would have been an answer to such allegation ; as, on an indictment for murder, a party might be

(*n*) 2 Hale, P. C. 246.

(*o*) 7 Will. 4 & 1 Vict. c. 85, § 11. As to the construction to be put upon this section, see *R. v. M'Rue*, 8 C. & P. 641 ; *R. v. Ellis*, id. 654 ; *R. v. Birch*, 2 C. & Kir. 193 ; *R. v. Holcroft*, id. 341 ; ante, § 173.

(*p*) See 1 Russ. C. & M. 837, 838, note by Mr. Greaves. See *R. v. Compton*, 3 C. & P. 418.

(*q*) 2 Hale, P. C. 246 ; *Holcroft's case*, 4 Rep. 46 (*b*) ; *Foster's C. L.* 326.

(*r*) *R. v. Berigan*, Ir. Cir. R. 177, 184—186, per Crampton, J. ; id. 195, note.

(*s*) *R. v. Walker*, 2 M. & Rob. 446, 457, 458, per Coltman, J. (*t*) Id.

convicted, not only of manslaughter, but even of an assault (u). It seems to follow from these principles and cases, that, if through a mistake on the part of the prosecutor, or through the ignorance or inattention of the officer of the court, a bill be preferred for manslaughter or larceny, and it should come out in evidence, that the offence amounted to murder in the one case, or to robbery, burglary, stealing in a dwelling-house, or stealing from the person, in the other, the Court should by no means direct the jury to acquit; but, if the circumstances were of an aggravated nature, should discharge the jury of that indictment, and order a fresh one to be preferred (x).

§ 1234. Having thus pointed out the distinction which exists between the admissibility and effect of judgments in rem and of judgments inter partes, it will be expedient to refer shortly to some rules which govern equally both classes of instruments. And first, it is laid down as an unquestionable rule of law, that neither a judgment in rem, nor a judgment inter partes, is *evidence of any matter which may or may not have been controverted*, or which came *collaterally* in question, or which was *incidentally cognizable*, or which can only be *inferred by argument* from the judgment (y). For instance, on an appeal against an order of removal, where the respondents relied on a derivative settlement from the pauper's father, they were not allowed to put in a previous order for the removal of the pauper's brother to the appellant parish, together with the examinations on which it was founded, though these examinations clearly proved that the brother's settlement was derived from the father (z). The order in this case for removing the brother was silent as to the ground of removal, and the Court held that the examinations, being no part of the record, could not be used to prove the particular species of settlement on which it rested (a). So, where an action of trover was brought against the administrator of a woman by a man who claimed to be her widower,

(u) R. v. Gould, 9 C. & P. 364. (x) See Foster's C. L. 327, 328.

(y) R. v. Duchess of Kingston, 20 How. St. Tr. 538; 2 Smith's Lead. Ca. 425, S. C.

(z) R. v. Sow, 4 Q. B. 93; R. v. Knaptoft, 2 B. & C. 883.

(a) 4 Q. B. 98.

and the defendant relied on the letters of administration, insisting that they could not have been granted to him but upon the supposition that the plaintiff and the intestate had never been married, the Court held, that, inasmuch as that question had never been put in issue and decided in the Ecclesiastical Court, they were not at liberty to infer from the grant of administration, that the parties were unmarried (*b*). So, where to debt on bond the defendant had pleaded a usurious agreement between the plaintiff and himself, and had averred that the bond was given in pursuance thereof; and issue having been joined on a traverse of this latter averment, the defendant had a verdict; the Court held that, in a subsequent action on a collateral security for the same debt, the plaintiff was not estopped by the former judgment from disproving the usurious agreement, inasmuch as the existence of such agreement had not been directly in issue in the action on the bond (*c*).

§ 1235. Next, there can be no doubt, that in all cases where a judgment is offered in evidence against a *stranger*, he may avoid its effects, by proving that it was obtained by *fraud* or *collusion*. To borrow the language of Lord Chief Justice De Grey, "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal" (*d*). Whether an *innocent party* would be allowed to prove, that a judgment against him was obtained by fraud, is a question not equally clear, as it would be in his power to apply directly to the court which pronounced the judgment to vacate it (*e*); but, however this point may be ultimately determined, thus much is evident, that a *guilty party* would not be permitted to defeat a judgment, by showing that, in obtaining it, he had practised an imposition on the court; for it would be

(*b*) Blackham's case, 1 Salk. 290, 291, per Lord Holt; cited and explained by Lord Lyndhurst, in *Barrs v. Jackson*, 1 Phill. Ch. R. 588, 589.

(*c*) *Carter v. James*, 13 M. & W. 137.

(*d*) *R. v. Duchess of Kingston*, 20 How. St. Tr. 544; 2 Smith's Lead. Cas. 431, 432; *Brownsword v. Edwards*, 2 Ves. Sen. 246, per Lord Hardwicke; *Philpson v. Earl of Egremont*, 6 Q. B. 605, per Lord Denman; *Meddowcroft v. Huquenin*, 4 Moore P. C. R. 386.

(*e*) *Prudham v. Phillips*, 2 Ambl. 763; 20 How. St. Tr. 479, 480, note, S. C.; *R. v. Duchess of Kingston*, 20 How. St. Tr. 544.

an outrage to justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct (*f*).

§ 1236. Again, every species of judgment will be rendered inadmissible in evidence, by showing that the court from which it emanated, had no *jurisdiction* (*g*). For instance, if an executor or administrator were to sue on a probate, or on letters of administration granted by a diocesan, the defendant might defeat his title, by pleading and proving that the testator, or intestate, had bona notabilia in other dioceses within the same province; because, in such a case, the metropolitan, and not the diocesan, would have jurisdiction to grant probate or administration (*h*). So, a probate or letters of administration may be defeated, by proving that the supposed testator, or intestate, is alive; for, in this event, the Ecclesiastical Court can have no jurisdiction, nor their sentence any effect (*i*). So, if a prisoner were tried before the Quarter Sessions, on a day to which the court had not been duly adjourned (*k*), or if, since the 15th of July, 1842 (*l*), he were tried before the justices in Sessions, for any offence which they are restrained from trying by the Act of 5 & 6 Vict. c. 38 (*m*), his

(*f*) *Prudham v. Phillips*, 2 Ambl. 763; 20 How. St. Tr. 479, 480, note, S. C. See *Doe v. Roberts*, 2 B. & A. 367; *Bessey v. Windham*, 6 Q. B. 166.

(*g*) *R. v. Bishop of Chester*, 1 W. Bl. 25, per Lee, C. J., as to sentences of visitors; *R. v. Washbrook*, 4 B. & C. 732, as to awards by public commissioners; *Mann v. Owen*, 9 B. & C. 595, as to sentences of Courts-Martial.

(*h*) *Marriot v. Marriot*, 1 Stra. 671; *Stokes v. Bate*, 5 B. & C. 491; 3 D. & R. 247, S. C.; B. N. P. 247. See also *Huthwaite v. Phaire*, 1 M. & Gr. 169; *Whyte v. Rose*, 3 Q. B. 493.

(*i*) *Allen v. Dundas*, 3 T. R. 129, 130, per Ashurst and Buller, Js.

(*k*) *R. v. Bowman*, 6 C. & P. 337.

(*l*) 5 & 6 Vict. c. 43.

(*m*) These crimes are treason, murder, capital felony, or any felony, which, when committed by a person not previously convicted of felony, is punishable by transportation for life; or any of the following offences:—

1. Misprision of treason;
2. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament;
3. Offences subject to the penalties of *præmunire*;
4. Blasphemy, and offences against religion;
5. Administering or taking unlawful oaths;
6. Perjury and subornation of perjury;
7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor;
8. Forgery;

acquittal or conviction would be no bar to a future indictment for the same offence, because the former proceedings, being *coram non iudice*, would be a mere nullity.

§ 1237. Questions of jurisdiction most frequently arise with regard to summary convictions by magistrates, orders of justices, and other judicial proceedings of inferior tribunals; and here, although, as we have seen (*n*), an adjudication of this kind cannot be impeached, by disproving the facts stated in it, not excepting those which are necessary to give jurisdiction, yet still, the parties against whom it is offered in evidence may establish its invalidity, either by proving any extrinsic facts, which show that the person or court pronouncing it had no authority to *enter into the inquiry* (*o*), or by pointing out the circumstance, that the adjudication itself does not disclose facts sufficient to give jurisdiction (*p*). Thus, if justices have acted in a matter not regularly before them, as if they should have proceeded to remove a pauper without any complaint being made by the parish officers, this may be shown by

9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern;
10. Bigamy, and offences against the laws relating to marriage;
11. Abduction of women and girls;
12. Endeavouring to conceal the birth of a child;
13. Offences against any provision of the laws relating to bankrupts and insolvents;
14. Composing, printing, or publishing, blasphemous, seditious, or defamatory libels;
15. Bribery;
16. Unlawful combinations and conspiracies, or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person;
17. Stealing or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein;
18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being, or containing evidence of, the title to any real estate or interest in lands, tenements, or hereditaments.

(*) Ante, §§ 1203—1205.

(o) *R. v. Bolton*, 1 Q. B. 66; *R. v. Somersetshire Js.*, 5 B. & C. 816; cited by Patteson, J., in *In re Clarke*, 2 Q. B. 634, 636.

(p) *In re Clarke*, 2 Q. B. 634, per Patteson, J.

evidence, and will be fatal to their order (*g*). So, where a justice had convicted a baker by four separate convictions of selling bread upon the same Sunday, and an action of trespass was brought against him, the Court held that he could not rely upon the convictions as a defence, since he had exceeded his authority in imposing more than one penalty for the same day, and, therefore, three of the convictions were of necessity void (*r*). The rule which renders it necessary that the order, on its face, should contain a statement of all facts which are requisite to show jurisdiction, is not confined to orders of justices; but, whenever a special statutory power is exercised, whether the order be made by a magistrate or by the Lord Chancellor, the facts which gave the authority must be stated (*s*).

§ 1238. Again, it is only where the point in issue in the first suit, or other legal proceeding, has been actually *determined*, that the judgment delivered therein is a bar to any subsequent action. Therefore, if the suit has been discontinued (*t*), or the plaintiff has become nonsuit (*u*), or if for any other cause there has been no judgment of the Court upon the matter in issue, the proceedings are not conclusive (*x*). Though the withdrawal of a juror, or the discharge of a jury, by consent, would seem to constitute no legal defence to a second action (*y*), it is so far regarded as putting a final end to the litigation, that, if the plaintiff were to bring a future action for the same cause, the Court, on the application of the defendant, would stay the proceedings, and make the plaintiff pay the costs incurred (*z*). Further, a judgment is inconclusive, if it appears that the decision did not turn *upon the merits*; as, for

(*g*) *R. v. Buckinghamshire Js.*, 3 Q. B. 807, per Lord Denman, explaining *R. v. Bolton*, 1 Q. B. 66; *Welch v. Nash*, 8 East, 394.

(*r*) *Cripps v. Durden*, 2 Cowp. 640; recognised by Dallas, C. J., in *Brittain v. Kinnaird*, 1 B. & B. 430.

(*s*) *Christie v. Unwin*, 11 A. & E. 373, 378, 379, per Lord Denman, and Coleridge, J. (*t*) 3 Bl. Com. 296.

(*u*) 3 Bl. Com. 296, 376, 377; *R. v. St. Anne, Westminster*, 2 Sess. Cas. 529, per Lord Denman.

(*x*) *Knox v. Waldoborough*, 5 Greenl. 185; *Hull v. Blake*, 13 Mass. 155; *Sweigart v. Berk*, 8 Serg. & R. 305; *Bridge v. Sumner*, 1 Pick. 371.

(*y*) *Sanderson v. Nestor*, Ry. & M. 402; *Everett v. Youells*, 3 B. & Ad. 349.

(*z*) *Gibbs v. Ralph*, 14 M. & W. 804.

instance, if the trial went off on a technical defect (*a*), or for faults in the declaration or pleadings (*b*), or because the action was misconceived (*c*), or because the debt was not then due (*d*), or because of a temporal disability of the plaintiff to sue (*e*), or because the plaintiff had mistaken his character, and sued as executor instead of administrator (*f*), or the like. In *Godson v. Smith* (*g*), an action of assumpsit was brought against an administratrix, to which she pleaded in abatement, that the intestate had promised jointly with sixteen others. At the trial it appeared, that the promises were made by the intestate jointly with some forty persons, and the defendant having thus failed to establish her plea, the plaintiff had a verdict for nominal damages, and entered up satisfaction on the judgment. He then sued the co-contractors for the same demand, and the Court held that the previous judgment was no bar to his recovery.

§ 1239. In some cases it may be difficult to determine what constitutes a decision upon the merits, and this question has frequently been before the Court of Queen's Bench, in cases where *appeals against orders of removal* have been allowed by the Sessions (*h*). Thus much, however, is clear with respect to this particular class of cases, that if the order has been quashed for informality (*i*), or because the pauper was not chargeable (*k*) or removeable (*l*) at the time when it was made, the allowance of the

(*a*) *Lepping v. Kedgewin*, 1 Mod. 207; *Lane v. Harrison*, 6 Munf. 573; *M'Donald v. Rainor*, 8 Johns. 442.

(*b*) *Hitchin v. Campbell*, 2 W. Bl. 831, per De Grey, C. J. (c) *Id.*

(*d*) *New Eng. Bank v. Lewis*, 8 Pick. 113.

(*e*) *Dixon v. Sinclear*, 4 Verm. 354.

(*f*) *Hitchin v. Campbell*, 2 W. Bl. 831, per De Grey, C. J.; *Robinson's case*, 5 Rep. 33. (g) 2 Moore, 157.

(*h*) See *R. v. Lancashire*, 3 Q. B. 367; *R. v. Evenwood Barony*, id. 370. *R. v. Charlbury*, id. 378; *R. v. Kingsclere*, id. 388; *R. v. Perrenzabuloe*, id. 400; *Ex parte Pontefract*, id. 391; *Ex parte Ackworth*, id. 397; *R. v. Clint*, 11 A. & E. 624; *R. v. St. Mary, Lambeth*, 7 Q. B. 587; 2 Sess. Cas. 36, S. C.; *R. v. Ellel*, 7 Q. B. 593; 2 Sess. Cas. 39, S. C.

(*i*) *R. v. Penge*, Nolan's Rep. 176; *R. v. Cottingham*, 2 A. & E. 250; *R. v. Great Bolton*, 7 Q. B. 387.

(*k*) *Osgathorpe v. Diseworth*, 2 Stra. 1256; *Burr. Sess. Cas.* 261, S. C.; *R. v. Wheelock*, 5 B. & C. 511.

(*l*) *R. v. Wick St. Lawrence*, 5 B. & Ad. 526.

appeal will not preclude the respondent parish from obtaining a second order of removal; and if it does not appear on the face of the former proceedings, that the order of justices was quashed "not on the merits," parol evidence will be admissible to explain the particular ground upon which it was quashed (*m*); although, in the absence of such evidence, the Court will presume, that the order of Sessions for quashing it was an adjudication upon the settlement (*n*). If the Sessions, in quashing an order of removal, make an entry that it is quashed "not on the merits," this will conclusively prevent the order of Sessions from operating as an estoppel between the parishes; and, consequently, on the hearing of an appeal against a subsequent order respecting the same settlement, the appellants will not be allowed to show that the former order was, in fact, quashed on the merits (*o*).

§ 1240. It seems almost needless to observe, that a party, against whom a judgment is offered in evidence, may always defeat its effect, by showing that it has been *reversed* (*p*). This rule applies to all courts alike, and therefore the title of an executor or administrator may be successfully disputed by proof that the probate or letters have been revoked (*q*). So, if a prisoner has been found guilty upon an indictment, which, on a case reserved for the judges, has been pronounced bad in law, he may again be put upon his trial for the same offence, because he has never yet been in real jeopardy (*r*). It is not equally obvious, though the law on the subject is now settled, that the *pendency of a writ of error* or an appeal will not prevent the judgment from operating as a bar (*s*). It follows *à fortiori* from this rule, that no objection can be taken to the binding effect of a judgment as

(*m*) *R. v. Wheelock*, 5 B. & C. 511; *R. v. Wick St. Lawrence*, 5 B. & Ad. 526; *R. v. Widecombe in the Moor*, 2 Sess. Cas. 539. *See Leeds 172 J. K. L. M. C. 1*

(*n*) *R. v. Wick St. Lawrence*, 5 B. & Ad. 535, per Parke, J.; *R. v. Yeoveley*, 8 A. & E. 806, 818, per Lord Denman.

(*o*) *R. v. St. Anne, Westminster*, 2 Sess. Cas. 525.

(*p*) 2 Smith's Lead. Cas. 438; *Hynde's case*, 4 Rep. 71 b, cited in *Doe v. Wright*, 10 A. & E. 775; *Wood v. Jackson*, 8 Wend. 9.

(*q*) B. N. P. 247.

(*r*) *R. v. Reader*, 4 C. & P. 245; cited in *R. v. Bowman*, 6 C. & P. 342.

(*s*) *Doe v. Wright*, 10 A. & E. 763, 783; 1 P. & D. 673, S. C.

evidence, on the ground that the declaration is so defective, that it would have been adjudged bad on general demurrer (*t*).

§ 1241. In some few cases the *effect of a judgment will materially vary*, according as it has been pronounced *in favour of the one or the other party*. Thus, while an order of sessions confirming an order of removal is conclusive against all the world, that the pauper, at the date of the first order, was settled in the parish to which he was sent, an order of sessions quashing an order of removal is conclusive between the contending parties alone, and that too, only as to the point which it decides, namely, that, at the time when the order of removal was made, the appellant parish was not bound to receive the pauper (*u*). Again, if the inhabitants of a parish be indicted for the non-repair of a road, and be convicted, this will furnish conclusive evidence of their liability to do the repairs, in the event of a subsequent indictment being brought against them; but an acquittal on such an indictment will not establish the non-liability of the defendants, because such acquittal might have proceeded on the ground that the road was not out of repair, and thus, the question of liability might not have been decided (*x*). Whether an acquittal on an information in rem in the Exchequer will be conclusive proof of the illegality of the seizure as against strangers, in the same way as a judgment of condemnation is conclusive in favour of its legality, may admit of some doubt. Lord Kenyon on one occasion seems to have considered that it was conclusive (*y*), but the point has never been expressly determined; and when we consider, that an acquittal does not, like a conviction, ascertain any precise fact, but may be occasioned by the laches of the prosecutor, it certainly seems reasonable to contend that strangers should not be conclusively bound thereby (*z*). In *Day v. Spread* (*a*) an action was brought in Ireland for necessities supplied to the defendant's wife, while living separate from her husband. In support of the plaintiff's

(*t*) *Hughes v. Blake*, 1 Mason, 515, 519, per Story, J.

(*u*) *R. v. Wick St. Lawrence*, 5 B. & Ad. 533, per Lord Denman; 535, per Parke, J.

(*x*) *R. v. St. Pancras*, 1 Pea. R. 220, 221.

(*y*) *Cooke v. Sholl*, 5 T. R. 256.

(*z*) B. N. P. 245; 2 Ph. Ev. 38, 39.

(*a*) *Jebb & Bourke*, Q. B. R. 163.

claim witnesses were called to prove that the separation was justifiable on the wife's part, as it was owing to the cruel and violent treatment of her husband. In order to rebut this case, and also to prove that the wife had been guilty of adultery, the defendant tendered in evidence a sentence of the Ecclesiastical Court, *dismissing* a suit instituted by the wife against her husband for a divorce on account of cruelty, in which suit the husband had made a counter allegation of adultery. The majority of the judges held, that this evidence was admissible, though there appears to be much weight in the argument of Mr. Justice Perrin, who held that it could not be received; but the whole Court considered, that, if received at all, it was entitled to very little weight; whereas, had the Ecclesiastical Court divorced the parties, there can be little doubt but that their sentence would have been conclusive in favour of the plaintiff.

§ 1242. With regard to *foreign judgments*, which term includes judgments, decrees, and other adjudications, whether strictly of record or not, emanating from Irish, Scotch, colonial, or foreign tribunals (*b*), their *admissibility and effect* in English courts will be found to depend on rules, which in many respects are similar to those that apply to home judgments. For instance, they are always admissible, whether for or against strangers or parties, in proof of their existence (*c*);—they are divisible into judgments *in rem* and judgments *inter partes*, the former being evidence of the facts adjudicated as against all the world, the latter being only admissible for and against parties and privies (*d*);—they furnish no evidence whatever of matters collaterally or incidentally noticed in them, still less of matters to be inferred by argument from them (*e*);—they must, in order to be received, finally determine the points in dispute, and be adjudications upon the actual

(*b*) *Houlditch v. M. of Donegal*, 8 Bligh, N. R. 337, 338, per Lord Brougham; 2 Cl. & Fin. 476, 477, S. C.; *Ferguson v. Mahon*, 11 A. & E. 179; 3 P. & D. 143, S. C.; *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 471, S. C., as to Irish judgments; *Cowan v. Braidwood*, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; *Russell v. Smyth*, 9 M. & W. 810, as to Scotch judgments; *Henderson v. Henderson*, 6 Q. B. 288, as to colonial decrees.

(*c*) *Tarleton v. Tarleton*, 4 M. & Sel. 20; ante, § 1201.

(*d*) Ante, § 1207.

(*e*) Ante, § 1234.

merits (*f*);—and they are open to be impeached on the ground, either of fraud or collusion (*g*), or of want of jurisdiction, whether over the cause, over the subject-matter, or over the parties (*h*).

§ 1243. The subject of *jurisdiction* deserves further notice; and here it may first be observed, that the courts of this country will so far presume, that a foreign tribunal has acted within the limits of its authority, and that its proceedings are regular, that, if an action be brought upon a foreign judgment, the plaintiff need not allege in his declaration, either that the foreign court had jurisdiction over the parties or the cause (*i*), or that the proceedings had been properly conducted (*k*). It seems, however, to be still necessary for a defendant to state these particulars, when he pleads such judgment by way of estoppel or of justification (*l*). Next, although it will scarcely be expected in a work like the present, that all the cases should be noticed, in which foreign judgments have been rejected as having emanated from a court having no jurisdiction, it may be useful to refer to a few leading decisions on the subject. Thus, sentences of foreign *prize* courts have repeatedly been held invalid by English judges, as being pronounced by a court having no jurisdiction, when it appeared that the court had sate in a neutral country under a commission from a belligerent power (*m*); and for this purpose a country has been considered neutral, where its independence was in form only preserved, the

(*f*) *Plummer v. Woodburne*, 4 B. & C. 625; 7 D. & R. 25, S. C.; *Smith v. Nicolls*, 5 Bing. N. C. 222, per Tindal, C. J.; *Sadler v. Robins*, 1 Camp. 253; *Garcias v. Ricardo*, 14 Sim. 265; *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

(*g*) *Price v. Dewhurst*, 8 Sim. 302—309, per Shadwell, V. C.; 4 Myl. & Cr. 85, per Lord Cottenham, S. C., on appeal; *Don v. Lippmann*, 5 Cl. & Fin. 20, per Lord Brougham; *Magoun v. N. Engl. Ins. Co.*, 1 Story, R. 157; *Bradstreet v. Neptune Ins. Co.*, 3 Sumner, 600.

(*h*) *Price v. Dewhurst*, 4 Myl. & Cr. 85, per Lord Cottenham; *Rose v. Himely*, 4 Cranch, 269, 270, per Marshall, C. J.

(*i*) *Robertson v. Struth*, 5 Q. B. 941.

(*k*) *Cowan v. Braidwood*, 1 M. & Gr. 882, 892, 895, per Maule, J.; 2 Scott, N. R. 138, S. C.

(*l*) *Collett v. Lord Keith*, 2 East, 260; *Gen. Steam Navig. Co. v. Guillon*, 11 M. & W. 877, 894. See *Ricardo v. Garcias*, 12 Cl. & Fin. 377, 378, 381.

(*m*) *The Flad Oyen*, 8 T. R. 270, n. by Sir William Scott; *Havelock v. Rockwood*, 8 T. R. 276. These cases virtually overrule a doubt thrown out by Lord Kenyon in *Smith v. Surridge*, 4 Esp. 26, 27.

belligerent having poured into it such a body of troops, as in reality to possess the sovereign authority (*n*).

§ 1244. Again, it is decided that no foreign court has power to annul a *marriage* solemnised in England between English subjects (*o*); at least, if, at the date of the divorce à vinculo, the parties were not bonâ fide domiciled in the foreign state (*p*). But if parties, domiciled in Scotland, be married in England, they may legally be divorced by a Scotch court, though it be still a vexata quæstio, whether such divorce would be recognised as valid in England (*q*). Whether the judgment of a foreign country on the validity of a marriage, which has been celebrated, either within its territories between parties who are not subjects to that country, or beyond its territories between parties, one or both of whom are natives of some other foreign state, would be binding upon our courts, is also an undetermined and difficult question, which depends upon principles of international law respecting jurisdiction, that are not yet definitively settled (*r*). On principle, however, it seems clear, that such a judgment should be either wholly inadmissible, or conclusive, in our courts, according as it should appear to have been pronounced by a tribunal not having, or having, jurisdiction over the subject-matter. And the same doctrine would equally apply to judgments of divorce pronounced by the court of a foreign country, when the marriage had not been celebrated, and the parties were not domiciled, in that country (*s*).

§ 1245. With respect to judgments inter partes, a doubt has been entertained as to whether a foreign court could exercise any jurisdiction over *real property* situate in another country. They

(*n*) *Donaldson v. Thompson*, 1 Camp. 429, per Lord Ellenborough.

(*o*) *R. v. Lolley*, R. & R. 237; *Tovey v. Lindsay*, 1 Dow, R. 117; *M'Carthy v. De Caix*, 2 Russ. & Myl. 614; 3 Hagg. Ecc. R. 642, n.; 2 Cl. & Fin. 568, n., S. C.

(*p*) *Conway v. Beazley*, 3 Hagg. Ecc. R. 639, 645—647, 653, per Dr. Lushington; *Dorsey v. Dorsey*, 7 Watts, 350, per Gibson, C. J.; 1 Chand. Law Rep. 287, 289; *Story Conf. of Laws*, § 230, a.

(*q*) *Warrender v. Warrender*, 9 Bligh, 89; 2 Cl. & Fin. 488, 540, 541, 558, S. C.

(*r*) *Sinclair v. Sinclair*, 1 Hagg. Cona. R. 297, per Lord Stowell.

(*s*) See *Story Conf. of Laws*, § 203, et seq.

clearly cannot do so *immediately*, because their judgment cannot directly bind the land; but still they may affect it *indirectly* by acting in personam, that is, through the medium of their power over the person entitled to it; and therefore, if an Irish, colonial, or other foreign court of equity were, by a valid decree, to appoint a receiver in this country, the party, on whose behalf the appointment was made, might, by filing a bill in the English Court of Chancery, get this foreign decree carried into execution. At least the converse of the above rule was solemnly decided in the House of Lords only a few years back (*f*).

§ 1246. Questions of jurisdiction have also frequently arisen, where the party, seeking to avoid the effect of a foreign judgment, has pleaded, with more or less particularity, that he was not, at the time of the proceedings against him, either resident within the territories of the foreign state, or the subject of such state; and here the rules, as far as they can be collected from the cases, appear to be these; first, that the plea must contain every allegation which is necessary to render the judgment invalid, and must, in short, be good *in omnibus* (*u*); and next, that, among the necessary allegations must be included averments, that the defendant was not a subject of the foreign state, or resident, or even present, in it at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicile, or temporary presence, by the decision of its courts (*x*); and further, that he was not the owner of real property in such state, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent (*y*). Moreover, it will generally be advisable, if not necessary,

(*f*) *Houlditch v. Donegal*, 8 Bligh, N. R. 301, 343—345, per Lord Brougham; 2 Cl. & Fin. 470, 479—481; Lloyd & G., Rep. temp. Sugden, 82, S. C.

(*u*) *Cowan v. Braidwood*, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; *Becquet v. MacCarthy*, 2 B. & Ad. 951; explained in *Don v. Lippmann*, 5 Cl. & Fin. 21, per Lord Brougham.

(*x*) *Gen. Steam Navig. Co. v. Guillou*, 11 M. & W. 894; *Cowan v. Braidwood*, 1 M. & Gr. 892, 893, per Tindal, C. J.; *Russell v. Smyth*, 9 M. & W. 810; *Reynolds v. Fenton*, 3 Com. B. 187.

(*y*) *Cowan v. Braidwood*, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C.; *Douglas v. Forrest*, 4 Bing. 686, 701—703; 1 M. & P. 663, S. C.

to add, that the defendant has had no notice or knowledge of the proceedings (*y*).

§ 1247. Besides the rules already stated (*z*), which are common to foreign and domestic judgments, there are others, which, if not exclusively applicable to foreign adjudications, are at least far more frequently applied to them than to the decisions of our own courts. For instance, if it be apparent upon the face of the proceedings, or can be made so by extrinsic proof, that a foreign judgment is contrary to the law of nations (*a*), or is repugnant to natural justice (*b*), or is founded on a mistaken notion of the English law (*c*), or is obviously opposed to the law of the country where it was pronounced (*d*), or is so grossly defective, as to render it doubtful what point, if any, was actually determined (*e*), or is manifestly erroneous, as professing to be made upon particular grounds, which plainly do not warrant the decision (*f*), its effect as evidence will be wholly neutralised.

§ 1248. In stating that foreign judgments, when *repugnant to natural justice*, will be disregarded in English courts, vague language is undoubtedly used; and it may be thought by some, that the frequent allusion to this rule by our judges savours slightly of a Chinese contempt for "outside barbarians." Still, it cannot be denied that the rule, in some cases, has been productive of much good; as for instance, in *Price v. Dewhurst* (*g*), where a judgment pronounced in the Danish island of St. Croix was disregarded in our courts, it appearing that one of the litigating

(*y*) *Cowan v. Braidwood*, 1 M. & Gr. 893.

(*z*) Ante, § 1242.

(*a*) *Baring v. Clagett*, 3 B. & P. 215, per Lord Alvanley; *Wolff v. Oxholm*, 6 M. & Sel. 92.

(*b*) *Ferguson v. Mahon*, 11 A. & E. 181, per Lord Denman, citing *Becquet v. MacCarthy*, 2 B. & Ad. 951; *Henderson v. Henderson*, 6 Q. B. 298, per Lord Denman; *Buchanan v. Rucker*, 1 Camp. 63, per Lord Ellenborough; 9 East, 192, S. C.; *Cowan v. Braidwood*, 1 M. & Gr. 895, per Maule, J.; *Sims v. Thomas*, 3 Ir. Law R. 417, per Brady, C. J.

(*c*) *Novelli v. Rossi*, 2 B. & Ad. 757; S. C. more full, 9 Law Journ. K. B. 307.

(*d*) *Sims v. Thomas*, 3 Ir. Law R. 415.

(*e*) *Obicini v. Bligh*, 8 Bing. 335; 1 M. & Scott, 477, S. C.

(*f*) *Calvert v. Bovill*, 7 T. R. 523; *Pollard v. Bell*, 8 T. R. 434.

(*g*) 8 Sim. 279, 305, 306; 4 Myl. & Cr. 76, 85, S. C.

parties had himself acted as the judge, and had decided the question in dispute in his own favour. So, it has several times been held, both in England and America, that a defendant may defeat the effect of a foreign judgment by pleading and proving, that in the court from which it proceeded no suit can be instituted without issuing process, and yet that he was never arrested, or served with, or had notice or knowledge of, any process at the suit of the plaintiff for the cause of action upon which the judgment was recovered, and that he had never appeared thereto; for the common justice of all nations requires, that no condemnation should be pronounced behind the back of a man, who has had no opportunity to appear and defend his interest, either personally, or by his proper representatives (*h*). The defendant, however, in framing such a plea, must carefully negative every state of facts on which the judgment can be supported; and therefore, if he merely deny that he has had notice of any *process*, and do not allege, that without process the suit in the foreign court would be a nullity, his plea will be bad on general demurrer; unless, perhaps, in the event of its containing a distinct averment, that the defendant has had no notice or knowledge whatever of the *suit* (*i*). In *Ferguson v. Mahon* (*k*), the plea, indeed, was held good, though it merely denied a notice of process; but that case, which was an action on an Irish judgment, can only be sustained, if at all, on the ground, that an English court will judicially recognise the fact, that an action must be commenced by process in Ireland (*l*). Other cases connected with this subject have already been referred to, while treating of the want of jurisdiction (*m*).

§ 1249. The most difficult point connected with foreign judgments is, to determine when they are *conclusive*, and when they are merely *prima facie* evidence of the facts adjudicated by them;

(*h*) *Ferguson v. Mahon*, 11 A. & E. 179; 3 P. & D. 143, S. C.; *Buchanan v. Rucker*, 1 Camp. 63; 9 East, 192, S. C.; *Cavan v. Stewart*, 1 Stark. R. 525; *Houlditch v. Donegal*, 8 Bligh, N. R. 338, 339, per Lord Brougham; *Story Conf. of Laws*, § 592; *Sawyer v. Maine Fire and Mar. Ins. Co.*, 12 Mass. 291; *Bradstreet v. Neptune Ins. Co.*, 3 Sumner, 600; *Magoun v. New Eng. Ins. Co.*, 1 Story, R. 157.

(*i*) *Reynolds v. Fenton*, 3 Com. B. 187.

(*k*) 11 A. & E. 179; 3 P. & D. 143, S. C.

(*l*) *Reynolds v. Fenton*, 3 Com. B. 191, per Maule, J.

(*m*) Ante, §§ 1243, 1246.

and here it will be convenient to consider the subject as it relates, first, to judgments in rem; next, to judgments inter partes, when they are set up by way of defence to a suit in a domestic tribunal; and, lastly, to such judgments, when they are sought to be enforced in our own courts against the original defendant, or his estate.

§ 1250. And first, as to *foreign judgments in rem*. The most important of these are the sentences of condemnation by foreign Courts of Admiralty on questions of *prize*; and here, although Lord Thurlow and Lord Ellenborough were wont to say that the practice of receiving them at all in evidence rested upon an overstrained comity, and was often productive of cruel injustice (*n*), it is now too late to dispute the rule, that, provided such sentences are not impeachable upon some one of the grounds before stated (*o*), they will be conclusive against all persons, and in all countries, as to the fact upon which the condemnation proceeded, where such fact is stated on the face of the sentence, free from ambiguity (*p*). At the same time, it seems equally clear, that the ground of condemnation may still be contested in an English court of law, when the language of the sentence, by setting out several reasons for the judgment, leaves it uncertain whether the ship was condemned upon a ground, which would warrant its condemnation by the law of nations, or upon another ground, which amounts only to a breach of the municipal regulations of the condemning country (*q*). Whether a sentence, which, without stating any ground of decision, should condemn a vessel as lawful prize, would be conclusively presumed to have been pronounced on some just ground, is a question of doubt. Lord Mansfield, and several other eminent judges of the last century, entertained an opinion in favour of its conclusive character (*r*); but this doctrine has been much shaken of late;

(*n*) *Fisher v. Ogle*, 1 Camp. 419, 420; *Donaldson v. Thompson*, id. 432.

(*o*) Ante, §§ 1242, 1243, 1247.

(*p*) *Dalgleish v. Hodgson*, 7 Bing. 504, per Tindal, C. J.; *Bolton v. Gladstone*, 5 East, 160, per Lord Ellenborough; *Lothian v. Henderson*, 3 B. & P. 499, 517, per Le Blanc, J.; *Kindersley v. Chase*, 2 Park, Ins. 743—752.

(*q*) *Dalgleish v. Hodgson*, 7 Bing. 496, 504; 5 M. & P. 407, S. C.; *Bernardi v. Motteux*, 2 Doug. 575; *Calvert v. Bovill*, 7 T. R. 523; *Baring v. Clagett*, 3 B. & P. 215.

(*r*) *Salonucci v. Woodmass*, 2 Park Ins. 727, per Lord Mansfield; recognised by Lord Alvanley in *Baring v. Clagett*, 3 B. & P. 215; and by Lawrence, J., in *Lothian v. Henderson*, 3 B. & P. 527; *Pollard v. Bell*, 8 T. R. 438, per Grose, J.; 444, per Le Blanc, J.

and in a case of some importance Chief Justice Tindal has not hesitated to declare, that, in order to bind strangers, the ground of the decision must appear clearly upon the face of the sentence, and that it will not suffice for it to be collected by *inference* only (*s*). Perhaps, the safest rule on the subject would amount to no more than this; that if, in an action upon a policy of insurance containing a warranty of neutrality, the underwriter were to rely upon a general sentence of condemnation, the assured might still show, that in fact the judgment had proceeded upon some ground other than that of an infraction of neutrality (*t*); although, in the absence of such proof, the Court would certainly feel bound to pronounce, that the ship was condemned as enemies' property (*u*).

§ 1251. Another important class of foreign judgments in rem consists of sentences concerning *marriage*, and sentences of *divorce* (*x*). These, when pronounced in the country where the marriage was solemnised, and the parties are domiciled, will be regarded in the courts of England as conclusive of the facts adjudicated, unless they be open to some of the objections before stated (*y*); for otherwise, as Lord Hardwicke once observed, "the rights of mankind would be very precarious" (*z*).

§ 1252. Foreign jurists strongly contend, that a similar doctrine should prevail in favour of all judgments in rem; and, consequently, that the decree of a foreign court, declaring the status of a person, and placing him, as an idiot, or a minor, or a prodigal, under *guardianship*, should be deemed of universal

(*s*) *Dalgleish v. Hodgson*, 7 Bing. 504; *Fisher v. Ogle*, 1 Camp. 418, per Lord Ellenborough.

(*t*) *Calvert v. Bovill*, 7 T. R. 527, per Lawrence, J.

(*u*) For American authorities respecting proceedings in rem in foreign courts of Admiralty, see *Croudson v. Leonard*, 4 Cranch, 434; *Williams v. Armroyd*, 7 Cranch, 423; *Hudson v. Guestier*, 4 Cranch, 293; *The Mary*, 9 Cranch, 126, 142—146; *Bradstreet v. Neptune Ins. Co.*, 3 Sumner, 600; *Grant v. M'Lachl & Co.*, 4 Johns. 34.

(*x*) The whole subject of foreign divorce is ably discussed by Mr. Justice Story in his *Confli. of Laws*, §§ 200—230 b.

(*y*) Ante, §§ 1242, 1244, 1247.

(*z*) *Roach v. Garvan*, 1 Ves. Sen. 159; *Ex parte Cottingham*, 2 Swanst. 326, n.; S. C. cited in *Boucher v. Lawson*, Cas. temp. Hardw. 9; *Sinclair v. Sinclair*, 1 Hagg. Consis. R. 297.

authority and obligation. So it doubtless would be deemed, in regard to all acts done within the territories of the sovereign whose tribunal pronounced the sentence. But, in this country, as also in America, the rights and powers of *guardians* are considered as strictly local; and no guardian is here admitted to have any right to receive the profits, or to assume the possession, of the real estate of his ward, or to control his person, or to maintain any action for his personalty, without having received a due appointment from the proper English authority (*a*).

§ 1253. The same rule is also applied to the case of *executors* and *administrators*; and it is now clearly established that, in order to sue in any court of England, whether of law or equity, in respect of the personal rights or property of a testator or intestate, the plaintiff must appear to have obtained a probate, or letters of administration, in the proper spiritual court of this country (*b*). A foreign probate or letters, granted by the court of the country where the property is found, may perhaps be brought under the notice of the English Prerogative Court, with the view of inducing that tribunal to clothe the foreign executor or administrator with proper English powers (*c*); but until he be so clothed, he cannot sue in this country; and when he is so clothed, he may sue without showing, in addition to his English title, that any probate or letters have been granted to him by the foreign court (*d*). If, indeed, an executor or administrator under a valid foreign probate or grant, has received a debt due to the deceased in the foreign country, and given a release for it, this will be a bar to any demand against the debtor on the part of an executor or administrator appointed in England; and to this extent, and for this purpose, the English tribunals will recognise and give effect to foreign probates and grants (*e*).

(*a*) Story Conf. of Laws, §§ 499, 504, 504 a, 594; Morrell v. Dickey, 1 Johns. Ch. R. 153; Kraft v. Wickey, 4 Gill & Johns. 332, 340, 341.

(*b*) Whyte v. Rose, 3 Q. B. 507, per Tindal, C. J., pronouncing the judgment of the Exchequer Chamber; Spratt v. Harris, 4 Hagg. Eccl. R. 405; Price v. Dewhurst, 4 Myl. & Cr. 80—82, per Lord Cottenham.

(*c*) Price v. Dewhurst, 4 Myl. & Cr. 84.

(*d*) Whyte v. Rose, 3 Q. B. 493, 507, 508; Carter and Crost's case, Godb. 33.

(*e*) Danyel v. —, Dalison, 76; S. C. as Daniel v. Luker, 3 Dyer, 305 a, pl. 58; recognised and explained in Whyte v. Rose, 3 Q. B. 510.

§ 1254. Next, as to foreign *judgments inter partes*, when they are set up by way of *defence* to an action or suit in a domestic court. Such a judgment, when pronounced *adversely* to the party who brings the second action, will be conclusively binding upon him, provided it be properly pleaded (*e*). But the plea requires to be carefully drawn; for, although it need not set forth the proceedings and judgment at length (*f*), yet if it omit the formal commencement and conclusion of a plea in the nature of an estoppel (*g*); or if it contain no averment that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country, by reason of allegiance, domicile, or temporary presence (*h*); or that the foreign court had jurisdiction over the subject-matter of the suit; or that, by the law of the foreign country, the judgment recovered was an absolute bar to a fresh action (*i*); or that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit (*j*); in any of these cases, the plea, on special, if not on general demurrer, will be held bad. If, too, the defendant, instead of pleading the judgment, contents himself with putting it in evidence, it will then, like a domestic judgment under similar circumstances, be merely cogent but not conclusive evidence in his behalf (*k*).

§ 1255. But now let us suppose, that the foreign judgment was pronounced *in favour* of the party who brings the second suit. Can the defendant avail himself of such judgment as a defence, where the plaintiff has declared on the original cause of action? Clearly he cannot, because the nature of the debt or damage sought to be recovered has not been changed; the plaintiff has no higher remedy in consequence of the foreign judgment; and he cannot issue immediate execution upon it in this country, but can only enforce it by bringing a fresh action of assumpsit or debt (*l*). If, indeed,

(*e*) *Philips v. Hunter*, 2 H. Bl. 410, per Eyre, C. J.; *Plummer v. Woodburne*, 4 B. & C. 625; 7 D. & R. 25, S. C.; *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

(*f*) *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

(*g*) *Gen. Steam Navig. Co. v. Guillou*, 11 M. & W. 877, 894.

(*h*) *Id.*

(*i*) *Plummer v. Woodburne*, 4 B. & C. 625; 7 D. & R. 25, S. C.

(*j*) *Ricardo v. Garcias*, 12 Cl. & Fin. 368.

(*k*) *Ante*, §§ 74, 1207.

(*l*) *Smith v. Nicolls*, 5 Bing. N. C. 208, 220, 221; 7 Scott, 147, S. C.

the foreign judgment has not only been recovered, but has had satisfaction entered up, it would then, we apprehend, be conclusive in favour of the defendant, if pleaded by way of estoppel; but we are not aware that the point has ever been expressly determined. We may here add, that if a man has been tried and acquitted in a foreign country by a court having competent jurisdiction, he may plead and prove such acquittal in bar of any indictment preferred against him in this country for the same offence (m).

§ 1256. We now come to foreign judgments *inter partes*, which are *sought to be enforced by an action or suit* in a domestic tribunal. And here it matters not whether the judgment has emanated from a Court of Record or not of record, from a superior or inferior court, from a court of common law, and from one exercising equitable jurisdiction; but in all cases alike, provided a clear balance has been ascertained, and a final decision on the merits has been *bonâ fide* pronounced by a tribunal of competent authority, the successful party may maintain an action of *assumpsit* or debt in any of our superior courts of common law for the recovery of the amount so decided to be due to him (n). Even costs awarded by a decreet of the Court of Session in Scotland in a suit for a divorce, have been recovered by an action of *assumpsit* brought against the defendant while resident in this country (o); and in conformity with this decision, it seems that were litigation to arise in France relating to real property, and were costs to be given against a party who should afterwards come to this country,

(m) *R. v. Roche*, 1 Lea. C. C. 134; B. N. P. 245.

(n) *Henderson v. Henderson*, 6 Q. B. 288; *Sadler v. Robins*, 1 Camp. 255, 256, per Lord Ellenborough; *Henley v. Soper*, 8 B. & C. 16; 2 M. & R. 153, S. C., as to decrees of colonial courts of equity; *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 471, S. C., as to a judgment of one of the superior courts in Ireland; *Arnott v. Redfern*, 3 Bing. 353, as to a judgment of a Court of Admiralty in Scotland. So, an action of *assumpsit* or debt lies upon a judgment of an inferior English court not of record, as, for instance, of a County Court, *Williams v. Jones*, 13 M. & W. 628. Whether debt would be maintainable at law upon a decree of the English Court of Chancery, which simply ascertained a debt, and ordered payment by defendant to plaintiff, is a question admitting of more doubt; but the better opinion seems to be, that such action might be brought. See *Henderson v. Henderson*, 6 Q. B. 286—299, questioning *Carpenter v. Thornton*, 3 B. & A. 52.

(o) *Russell v. Smyth*, 9 M. & W. 810.

an action for such costs might here be maintained (*p*). The decrees of foreign courts of equity, might, indeed, in some instances, not be enforceable in our courts of law, because they might involve collateral and provisional matters, to which a court of law could give no effect; but even then, the English Court of Chancery would entertain a bill founded on such a foreign decree, for the purpose of giving effect to it in regard to English property (*q*).

§ 1257. It is admitted on all sides that, in these actions and suits, the foreign judgments are *prima facie evidence* in support of the plaintiff's claim, and are to be deemed right until the contrary is established (*r*). But the question still remains, are such judgments to be deemed *conclusive*, or can the defendant, by going at large into the *original merits*, dispute the propriety of the decisions? The arguments on either side of this vexed question are well put by Mr. Smith in his admirable note on the Duchess of Kingston's case. "Now upon one side it is said, that the tribunals of this country are not *bound* to enforce the judgments of a foreign court; that when they do so, it is *de gratia*, and from a wish to extend the limits of justice—*ampliare justitiam*. But that it would be to amplify injustice, not justice, were they to enforce a sentence, which ought never to have been pronounced, because against the party with whom right was. On the other side, it is answered with great force, that invariable experience shows, that facts can never be inquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them; that if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequence would be, in ninety-nine cases out of a hundred, that they would be deceived by the

(*p*) Russell v. Smyth, 9 M. & W. 818, per Lord Abinger.

(*q*) Henderson v. Henderson, 6 Q. B. 297, per Lord Denman; Houlditch v. M. of Donegal, 8 Bligh, N. S. 301; 2 Cl. & Fin. 470; Lloyd and G., Rep. temp. Sugden, 82, S. C.

(*r*) Sinclair v. Fraser, per Dom. Proc., cited in 20 How. St. Tr. 468, 469, and in 1 Doug. 4, n.; recognised in Arnott v. Redfern, 3 Bing. 357, and in Robertson v. Struth, 5 Q. B. 943, 944; Cowan v. Braidwood, 1 M. & Gr. 892, 895, per Maule, J.

concoction of testimony, or by the abstraction of it, or by the want of it, and that injustice and mistakes, instead of being amended, would be generated" (s).

§ 1258. Mr. Justice Story, too, in his *Conflict of Laws*, makes the following forcible observations in support of the conclusiveness of foreign judgments. "It is indeed," says he, "very difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the Court upon the whole evidence, may have been decidedly in favour of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation: is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case upon new evidence? Or is the Court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the Court to open the judgment, and to proceed *ex æquo et bono*? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule, that the judgment is to be *prima facie* evidence for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand, that the defendant may be at liberty to impeach the original

(s) 2 Smith's Lead. Cas. 449; 450.

justice of the judgment, by showing that the Court had no jurisdiction; or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular, and bad by the local law *Fori re; judicatae*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits" (t).

§ 1259. In accordance with these views, it has several times been held by the Court of Queen's Bench, that no inquiry can be instituted into the merits of the original action, or the propriety of the decision; and that the defendant is not at liberty to raise any objection, which would have constituted a defence in the foreign court, and which, consequently, should there have been pleaded, and finally disposed of (u). The same doctrine, too, has been advanced, with more or less confidence, by Lord Nottingham (x), Lord Kenyon (y), Lord Ellenborough (z), Sir L. Shadwell (a), Mr. Baron Parke (b), and the Court of Exchequer in Ireland (c). On the other hand, Lord Hardwicke (d), Lord Mansfield (e), Chief Baron Eyre (f), Mr. Justice Buller (g), Mr. Justice Bayley (h), and especially Lord Brougham (i), have strenuously contended that foreign judgments, when actions are brought upon them, are merely *prima facie* evidence on behalf of

(t) Story Conf. of Laws, § 607.

(u) *Henderson v. Henderson*, 6 Q. B. 288, 298, 299; *Ferguson v. Mahon*, 11 A. & E. 179, 183; 3 P. & D. 143, S. C.

(x) *Gold v. Canham*, cited in note to *Kennedy v. Cassillis*, 2 Swanst. 325.

(y) *Galbraith v. Neville*, 1 Doug. 6, n.

(z) *Tarleton v. Tarleton*, 4 M. & Sel. 22.

(a) *Martin v. Nicolls*, 3 Sim. 458.

(b) Citing *Martin v. Nicolls*, in *Becquet v. MacCarthy*, 2 B. & Ad. 954.

(c) *Sims v. Thomas*, 3 Ir. Law R. 415.

(d) *Isquierdo v. Forbes*, cited by Lord Mansfield, in 1 Doug. 6.

(e) *Walker v. Witter*, 1 Doug. 1.

(f) *Philips v. Hunter*, 2 H. Bl. 410.

(g) *Galbraith v. Neville*, 1 Doug. 6, n.; *Messin v. Lord Massareene*, 4 T. R. 493.

(h) *Tarleton v. Tarleton*, 4 M. & Sel. 23.

(i) *Houlditch v. M. of Donegal*, 8 Bligh, N. S. 301, 337—342; 2 Cl. & Fin. 470, 477—479, S. C.; *Don v. Lippmann*, 5 Cl. & Fin. 1, 20—22.

the plaintiff; and this rule also prevails in America, though the extent to which it should be carried is certainly not yet definitively settled in that country (*k*). On the whole, if it be allowable to express an opinion on a subject, respecting which so much doubt prevails, we should submit that the arguments, if not the authorities, in support of the conclusiveness of foreign judgments, preponderate over those in favour of a contrary doctrine.

§ 1260. But, however this precise point may be ultimately determined, it seems to be acknowledged law both in England and America (*l*), that, when a foreign judgment, instead of being itself the consideration of the promise declared on, merely comes *incidentally* or *collaterally* in question, it cannot be disputed. Thus, in *Tarleton v. Tarleton* (*m*), the plaintiff and defendant had been partners, and the latter, on the dissolution of the partnership, had covenanted to indemnify the former against the debts of the late firm. In an action on that covenant, the plaintiff, in order to prove the damnification, put in a judgment recovered in a foreign court by a creditor of the firm against himself and the defendant, in consequence of which his property had been seized; and the Court held, that the defendant was not at liberty to show that the proceedings were erroneous.

§ 1261. Another rule connected with this subject has already been referred to as equally clear (*n*), and that is, that a foreign judgment does not occasion a *merger* of the original ground of action; and, therefore, when it becomes necessary to enforce the plaintiff's demand in this country, he may either resort to such original ground, or bring assumpsit or debt upon the judgment (*o*). In the event of his adopting the former of these courses, it would seem that the defendant might still, notwithstanding the production of the judgment, dispute the plaintiff's demand; for, it might well

(*k*) Story Conf. of Laws, § 608, and cases there cited.

(*l*) See cases cited in Cowen's notes to 1 Ph. Ev. 353, Am. Ed.

(*m*) 4 M. & Sel. 20; recognised by Lord Brougham in *Houlditch v. Donegal*, 8 Bligh's N. R. 341; 2 Cl. & Fin. 478, S. C. (*n*) Ante, § 1255.

(*o*) *Hall v. Odber*, 11 East, 118, 126, 127, per Bayley, J.; *Smith v. Nicolla*, 5 Bing. N. C. 221, 222, per Tindal, C. J.

be contended, that, by his mode of declaring, the plaintiff had himself courted a reinvestigation of the merits (*p*).

§ 1262. Having now stated the general rules, which govern the admissibility and effect of domestic and foreign judgments, it remains to point out one or two statutes, by which the receipt in evidence of the adjudications and proceedings of particular tribunals is regulated. And first, as to the adjudications and other proceedings in *Courts of Bankruptcy*. We have seen that, before these can be admitted in evidence, they must be filed as of record, after which they may be proved by certified copies (*q*); but the question still remains, what is their *effect*, when proved? and here we must bear in mind, that an adjudication in bankruptcy, unlike a judgment in rem (*r*), is *no evidence of the facts on which it is founded*; and therefore, the assignees, notwithstanding the fiat, would, in any action or suit brought by or against themselves, be forced to prove at common law *the trading, the petitioning creditor's debt, and the act of bankruptcy*, since the fiat and their appointment under it would be merely evidence to complete their title, when these preliminary matters had first been established. The inconvenience, however, of requiring this proof to be reiterated on every fresh action or suit, has been felt to be so great, that the Legislature has interposed; and by a very sensible enactment, has dispensed with the proof of the trading, the petitioning creditor's debt, and the act of bankruptcy, except in cases where a written notice of an *intention to dispute* any or all of such matters has been given to the assignees; and then, in order to check the service of these notices, it has empowered the Court to allow the assignees costs in the event of their proving the facts disputed (*s*).

(*p*) See 2 Smith's Lead. Cas. 448.

(*q*) Ante, § 1140.

(*r*) Ante, § 1207.

(*s*) 6 Geo. 4, c. 16, § 90, enacts, "That in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for anything done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, unless the other party in such action shall, if defendant, at or before pleading, and, if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person shall

§ 1263. The notice, under the Act, which does not require personal service, but may be served upon the attorney (*t*) of the assignees, or even upon their clerk at their counting-house (*u*), or the like, must be given, at common law, *on or before pleading* (*v*), if the assignees be plaintiffs, or *before issue joined* (*x*), if they be defendants; and in equity, within ten days after rejoinder in all cases. With respect to the *form* of the notice, it must be specific; and therefore, if it simply states an intention to dispute "the bankruptcy," it will not suffice (*y*); and if, to dispute "the act of bankruptcy," it will admit the trading and the petitioning creditor's debt (*z*). Where the assignees are plaintiffs at common law, they cannot be put to the proof of the preliminary matters, either by the mere service of a notice without a plea denying their title, or by such plea without a notice; but there must be both plea and notice (*a*). The rule requiring notice is not confined to cases where the assignees sue or are sued in assumpsit in their representative

prove the matter so disputed, or the other party admit the same, the judge before whom the cause shall be tried may (if he thinks fit) grant a certificate of such proof or admission; and such assignee commissioner or other person shall be entitled to the costs to be taxed by the proper officer occasioned by such notice, and such costs shall, if such assignee, commissioner, or other person, shall obtain a verdict, be added to the costs, and, if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person."

§ 91 enacts, "That in all suits in equity by or against the assignees, no proof shall be required at the hearing of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days after rejoinder, give notice in writing to the assignees of his or their intention to dispute some and which of such matters; and where such notice shall have been given, if the assignees shall prove the matter so disputed, the costs occasioned by such notice, to be taxed by the proper officer, shall, if the Court see fit, be paid by the party or parties so giving such notice as aforesaid, and the service of such notice may be proved by affidavit upon hearing of the cause."

(*t*) *Howard v. Ramsbottom*, 3 Taunt. 526.

(*u*) *Widger v. Browning*, 2 C. & P. 523, per Abbott, C. J.; *M. & M.* 27, S. C.

(*v*) *Poole v. Bell*, 1 Stark. R. 328; *Lawrence v. Crowder*, 2 C. & P. 229.

(*x*) *Richmond v. Heapy*, 4 Camp. 207, per Lord Ellenborough.

(*y*) *Trimley v. Unwin*, 6 B. & C. 537; 9 D. & R. 548, S. C.

(*z*) *Porter v. Walker*, 1 M. & Gr. 686; 1 Scott, N. R. 568, S. C.

(*a*) *Moon v. Raphael*, 7 C. & P. 115; *Scott v. Thomas*, 6 C. & P. 611, as explained in *Buckton v. Frost*, 8 A. & E. 845, n. (*a*); Reg.-Gen. H. T. 4 Will. 4, r. 21; 5 B. & Ad. vii.

character, but it extends to all actions alike, whether in assumpsit, debt, case, trover (*b*), trespass (*c*), or even ejectment (*d*); and this too, whether or not it appears on the face of the record that the assignees are suing or being sued as such, provided it be clear that the opposite party must have known that the bankruptcy would in point of fact be relied upon (*e*). It also applies to actions brought by the bankrupt himself against the assignees (*f*); to cases where the servants of the assignees are joined with them as defendants (*g*); and to actions brought against any commissioner, or person acting under the warrant of the commissioners, for anything done as such commissioners, or under such warrant. But the rule is inapplicable to a feigned issue (*h*); or to a case, where the assignees are strangers to the record, and their title comes incidentally in question (*i*); and here, therefore, notwithstanding the want of notice, the title of the assignees must be strictly proved.

§ 1264. Next, assuming that a notice has been duly served, and that the title of the assignees is disputed by the pleadings, it remains to be seen in what cases the proceedings in bankruptcy may be put in as sufficient proof of the preliminary facts; and here it will be necessary to advert to several enactments, which are scattered through the statutes relating to bankrupts. The most important of these is § 17 (*j*) of the Act of 1 & 2 Will. 4, c. 56, which,

(*b*) *Butler v. Hobson*, 4 Bing. N. C. 290; *Buckton v. Frost*, 8 A. & E. 844; 1 P. & D. 102, S. C.

(*c*) *Gilman v. Cousins*, 2 Stark. R. 182.

(*d*) *Doe v. Liversedge*, 11 M. & W. 517.

(*e*) *Fawcett v. Fearn*, 6 Q. B. 25, n.; *Simmonds v. Knight*, 3 Camp. 251.

(*f*) *Ex parte Dick*, 1 Rose, 41.

(*g*) *Gilman v. Cousins*, 2 Stark. R. 182, per Bayley, J.

(*h*) *Lott v. Melville*, 3 M. & Gr. 40; 3 Scott, N. R. 346, S. C. See *Linnit v. Chaffers*, 4 Q. B. 762.

(*i*) *Doe v. Liston*, 4 Taunt. 741.

(*j*) This sect. enacts, "That if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the said Court of Review, such petition to be presented within two calendar months from the date of such adjudication, if such trader shall be then residing within the United Kingdom, or within three calendar months from the date aforesaid if then residing within any other part of Europe, or within one year from the date aforesaid if then residing elsewhere, or within such other time as the

after authorising the bankrupt within a limited period to dispute the adjudication of the commissioner, by petitioning the Court of Review, when such Court may either hear the case or direct an issue on the subject, goes on to enact, that if the verdict on such issue shall not be set aside on application made to the Court of Review within a month, or if the adjudication of the commissioner shall not be set aside by the Court of Review, such *verdict* or *adjudication* shall in all cases as against the bankrupt, the petitioning creditor, the assignees and persons claiming under them, and all persons indebted to the bankrupt's estate, be *conclusive evidence* that the party was or was not a bankrupt at the date of such adjudication.

§ 1265. Next, under § 92 of 6 Geo. 4, c. 16 (*k*), if the bankrupt does not, within a limited period, give notice of his intention

said court shall allow, (not exceeding one year to be computed from the date aforesaid,) such Court of Review shall proceed to hear and decide on the said petition; or, at the option of the said bankrupt, and on his finding such security for costs (if the said court shall think fit to require any security) as by the said court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury, to be duly impannelled and sworn for that purpose, before the chief judge or any one or more of the other judges of the Court of Bankruptcy; and if the verdict on such issue shall not be set aside on application made to the said Court of Review, within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the said Court of Review on the petition aforesaid, such verdict or such adjudication of the said commissioner shall in all cases, as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading, than the act, debt, or trading proved at such trial notwithstanding: Providing always that an appeal shall be to the Lord Chancellor from the decision of the said Court of Review, upon matter of law or equity, or on the refusal or admission of evidence only."

(*k*) This sect. enacts, "That if the bankrupt shall not, (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively con-

to dispute the fiat, and proceed therein with due diligence, the *depositions* taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt, and of the trading and act of bankruptcy, shall be *conclusive evidence* of the matters therein contained, in all actions or suits brought by the assignees for any debt or demand for which the bankrupt, had no bankruptcy intervened, might have sustained any action or suit (*l*). Besides these enactments, we have already seen, that the *deposition* of any witness who has deposed to the petitioning creditor's debt, the trading, or the act of bankruptcy, will, in the event of his *death*, be receivable in evidence of the matters therein contained (*m*) ; that the bankrupt and his debtors may be estopped from disputing the bankruptcy, or the date of the fiat, if such date be subsequent to the 11th of November, 1842, by putting in the *Gazette* containing the advertisement of the bankruptcy, and showing that the bankrupt has not disputed the fiat within the prescribed period (*n*) ; and that the bankrupt will, in certain cases, be protected by putting in his *certificate of conformity* (*o*).

§ 1266. Next, as to the judicial proceedings of the Courts for the relief of *insolvent debtors*. The admissibility and effect of the vesting order, and of the appointment of assignees, are mainly regulated by § 46 of the Act of 1 & 2 Vict. c. 110, which enacts, that a certified copy of these documents shall be sufficient evidence of the title of the provisional assignee, and of the other assignees respectively (*p*). Upon this enactment it may be observed, first, that it does not preclude the assignees from proving their title by putting in the original documents instead of certified copies ; secondly, that, although the assignee, on accepting the appointment, has vested in him all the estate of the insolvent from the date of the vesting order, the order for his appointment is no

tained, in all actions at law or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit."

(*l*) See *Kitchener v. Power*, 3 A. & E. 232 ; 4 N. & M. 710, S. C. ; *Alsager v. Close*, 10 M. & W. 576 ; *Fox v. Mahoney*, 2 Cr. & Jer. 325 ; 2 Tyr. 285, S. C. ; *Smith v. Woodward*, 4 C. & P. 541. These cases overrule *Jones v. Fort*, M. & M. 196 ; and *Gibson v. Oldfield*, 4 C. & P. 313.

(*m*) Ante, § 357.

(*n*) Ante, § 1199.

(*o*) Ante, § 1140.

(*p*) See ante, § 1141.

evidence of the time from which his title accrues, even though it recite the date of the vesting order; and, therefore, if it be necessary for him to show that he was entitled to the property at some time preceding the date of his appointment, he must establish that fact by proving the date of the vesting order; but, thirdly, he may prove that date, not only by means of the original order or a certified copy thereof, but by putting in a certified copy of the adjudication of the discharge of the insolvent, which states the date of the vesting order, and is admissible evidence of such date, the statement being an essential part of the adjudication (*q*). The removal of assignees may be proved by a certified copy of the order for that purpose (*r*). In short, all the proceedings in the Insolvent Debtors' Court may be proved, as before stated, by certified copies, which will be admitted in all courts as sufficient evidence of the same respectively (*s*). We may add, that in the event of an action being brought against an insolvent debtor upon any new contract or security for the payment of any debt, with respect to which he has become entitled to the benefit of the Act, he may plead his discharge generally, and defeat his adversary by putting in a certified copy of the adjudication, of the schedule of debts sworn to by him, and of his petition (*t*). This last document should be put in to avoid disputes, though perhaps it is not strictly necessary (*u*).

§ 1267. Passing now from judgments to other judicial documents, little need be here said respecting the admissibility and effect of these when offered in evidence. It has already been stated, that *answers* in Chancery are receivable against the party by whom they were sworn, as cogent admissions of the allegations which they contain (*w*); but *demurrers* and *pleas* in equity are not so receivable, they being merely hypothetical statements, which, *assuming* the facts to be as alleged, deny that the defendant is bound to answer (*x*). With respect to *bills*, it has been the fashion in Westminster Hall to regard them as inadmissible,

(*q*) *Yorke v. Brown*, 10 M. & W. 78.

(*r*) 1 & 2 Vict. c. 110, § 65.

(*s*) 1 & 2 Vict. c. 110, § 105, cited ante, § 1141.

(*t*) 1 & 2 Vict. c. 110, § 91. See *Reid v. Croft*, 5 Bing. N. C. 68.

(*u*) See ante, § 1150. See also *Hounsfield v. Drury*, 11 A. & E. 98.

(*w*) Ante, § 511.

(*x*) Ante, § 596.

excepting to prove their own existence, or that certain facts were in issue between the parties, or as evidence of relationship in cases of pedigree (*y*); their exclusion for other purposes being supposed to rest upon the ground that they are little more than mere suggestions of counsel, made for the purpose of obtaining an answer upon oath. However, this doctrine has recently been shaken by a decision in the House of Lords (*z*); and although the *interrogatory* part, and even the *narrative* part, of the bill, are doubtless entitled to little, if any, weight, for the reasons above given (*a*); yet the *prayer* of the bill may, as it seems, amount to grave proof in the nature of an admission; and, possibly, the whole bill will, *valet quantum*, be receivable in evidence (*b*).

§ 1268. In regard to *depositions*, it is to be observed, that, though informally taken, yet as mere declarations of the witness under his hand, they are receivable against him whenever he is a party, like any other admissions (*c*); or to contradict and impeach him, when he is afterwards examined as a witness (*d*). But, as secondary evidence, and as a substitute for his testimony *vivd voce*, it is essential that they be regularly taken, under legal proceedings duly pending, or on some other occasion sanctioned by law (*e*); and, unless the case be provided for by statute, or by a rule of Court, it must further appear, that the witness himself cannot be personally produced (*f*). In some cases depositions will be admissible even against strangers: as, for instance, if they relate to a custom, prescription, or pedigree, where reputation would be evidence; for, as the unsworn declarations of persons deceased would be here admissible, *a fortiori* their declarations on oath are so.

§ 1269. With respect to *rules, orders, matters, and decisions*,

(*y*) *Doe v. Sybourn*, 7 T. R. 3, per Lord Kenyon; *Taylor v. Cole*, id. n.

(*z*) *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 777, 778; 5 Ir. Law R. 380, 396, S. C. This case appears to overrule *Doe v. Sybourn*, 7 T. R. 2.

(*a*) *Ante*, § 621; *Pennell v. Meyer*, 2 M. & Rob. 99, per Tindal, C. J.; 8 C. & P. 470, S. C.

(*b*) This question is now under the consideration of the Court of Exchequer, in the case of *Boileau v. Rudlin*, which was heard in and after H. T. 1848.

(*c*) *Ante*, § 511.

(*d*) *Ante*, §§ 1056, et seq. 1085.

(*e*) *Ante*, § 343, et seq.

(*f*) *Ante*, § 347, et seq.

made or done in pursuance of the *Interpleader Acts*, these, except only the affidavits that are filed, may, with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry; and they will then be admissible in evidence; and the rules and orders so entered will have the effect of judgments, except only as to becoming charges on real property (*g*).

§ 1270. The general admissibility of *inquisitions* rests upon the ground, that they contain the result of inquiries made under competent authority, concerning matters in which the public are concerned (*h*). As such, they are receivable even against strangers, though, as we have before observed, they are far from being conclusive evidence (*i*). These documents, since the abolition of writs of right, and the passing of the recent statutes of limitation, have become of much less importance than they formerly were, as sources of evidence. They are still, however, occasionally of value, especially in matters of pedigree, in questions respecting the right of church patronage, or the existence or amount of a *modus*, and in peerage claims.

§ 1271. Among the most important of them may be mentioned *Domesday-book* (*k*), a work of which every one has heard, though few persons are aware of its contents. This book, which is the most ancient inquisition extant, was compiled a few years after the Conquest by Commissioners, styled the justiciaries of the king, upon the oaths of the Sheriffs, the Lords of the Manors, the Presbyters of every Church, the *reves* of every hundred, and the bailiffs and six villans of every village. It contains a general survey of all the counties in England, except the four northern, and specifies the name and local position of each place; its possessor in the time of King Edward the Confessor; its possessor at the time of the survey; how many hides in the manor; how many carrucates in demesne; how many homagers, *cotarii*, *servi*,

(*g*) 1 & 2 Will. 4, c. 58, § 7; 9 & 10 Vict. c. 64, § 7, *Ir*.

(*h*) 2 Ph. Ev. 95.

(*i*) *Ante*, § 1208.

(*k*) Now deposited in the Record Office. See *ante*, § 1095. As to the mode of proving entries contained in it, see *ante*, § 1129.

freemen, and tenants in socage;—what quantity of wood, meadow, and pasture; what mills and fish ponds; what the gross value in King Edward's time, and at the time of the survey; and how much each freeman or sockman had at these respective periods (*n*). If we are to believe Ingulphus, the learned Abbot of Croydon, the commissioners were not always remarkable for a strict impartiality (*o*); but be this as it may, Domesday-book is not often available as practical evidence, owing to the frequent changes of name, which the hundreds and other places described in it have undergone since the eleventh century (*p*); though it is only just to our antiquaries to state, that this defect has, to a certain extent, been remedied by their learned labours.

§ 1272. It is not easy to lay down any precise rule as to how far *judicial documents* will be evidence of the *facts recited* in them. Thus, although it has been held, that a judge's order referring a cause may be proved by the rule, making it a rule of court, in which it is recited and incorporated (*q*); yet, a written and attested agreement of reference cannot be proved by the production of the rule of court (*r*). The difference between these cases seems to be, that the judge's order is in itself a judicial act, the form, but not the character, of which is altered by its being made a rule of court, whereas a submission by written agreement is a mere contract; and, as the making it a rule of court is only an *ex parte* proceeding, it would be unjust, if the rule, thus obtained by one party behind the back of the other, were to be regarded as any evidence of the facts introduced into it (*s*). So, a warrant

(*n*) Those who wish for further information on this subject are referred to Sir H. Ellis's *Introd. to Domesday*, in two vols.; Ingulphus, ed. Gale, pp. 79, 80; Brady, *History of Eng.* 205—208; Miss Strickland's *Lives of Queens of Eng.*, vol. 1, pp. 91—93.

(*o*) Ingulphus, ed. Gale, p. 79. His words are, "Isti penes nostrum monasterium benevoli et amantes, non ad *verum pretium* nec ad *verum spatium* monasterium librabant, misericorditer præcavescentes in futurum Regiis exactionibus, et aliis oneribus, piissima nobis benevolentia providentes."

(*p*) Sir H. Ellis's *Introd.* vol. 1, p. 34.

(*q*) *Still v. Halford*, 4 Camp. 17, per Lord Ellenborough; recognised in *Berney v. Read*, 7 Q. B. 82.

(*r*) *Berney v. Read*, 7 Q. B. 79.

(*s*) *Id.* 82, 83, per Lord Denman.

of commitment, unlike a conviction (*t*), is not evidence of the facts which it recites; and therefore in an action against a justice for false imprisonment under the Vagrant Act (*u*), the defendant was held bound to prove that an information on oath had been regularly made, though the warrant recited that fact (*x*). So, the existence of a warrant of attorney cannot be proved, so as to render its production unnecessary, by putting in a rule of court setting it aside (*y*).

§ 1273. In regard to *official registers*, we have already, while treating of the mode of proof, stated the principles, on which these books are entitled to credit (*z*); to which it is only necessary to add, that, when the books possess all the requisites there mentioned, they are admissible as competent evidence of the facts they contain, provided such facts be required by law to be recorded in them for the public benefit, and be necessarily within the knowledge of the registering officer. Thus, a marriage register is evidence, not only of the fact of the marriage, but of the time of its celebration; for both these facts must have been known to the clergyman making the entry, and it was his duty to state them correctly in the register (*a*). So, a register of baptism is evidence of that fact, and of its date; but it furnishes no proof of the age of the party, further than that he was born at such date, even though it state the day of his birth (*b*). Neither taken *per se*, is it any evidence of the place where the child was born, although, if other circumstances be proved, as that the child at the time of baptism was very young, or had since been removed to the parish where the register was kept, or relieved by such parish while living beyond its limits, it may then, in connection with these facts, afford pre-

(*t*) Ante, § 1203, et seq.

(*u*) 5 Geo. 4, c. 83.

(*x*) *Stephens v. Clark*, 2 M. & Rob. 435, per Cresswell, J.

(*y*) *Compton v. Chandless*, 4 Esp. 18, per Lord Kenyon. See also *Yorke v. Brown*, 10 M. & W. 78.

(*z*) Ante, § 1167.

(*a*) *Doe v. Barnes*, 1 M. & Rob. 386, 389, per Lord Denman; 6 & 7 Will. 4, c. 86, § 38, cited ante, § 1177, n. (*y*)

(*b*) *R. v. Clapham*, 4 C. & P. 29, per Lord Tenterden; *Burghart v. Angerstein*, 6 C. & P. 690, 696, per Alderson, B.; *Wiher v. Law*, 3 Stark. R. 63, per Bayley, J.

sumptive evidence of the place of birth (c). It seems, too, that, if the register contains a statement that the child was illegitimate, it may be read as *some* proof of that fact, being regarded as evidence of the reputation in the parish (d). Registers of births and deaths, under the Registration Act (e), are evidence, not only of the births and deaths to which they relate, but of the place where these events occurred, whenever, by the direction of the Registrar-General, that fact has been added to the entry (f). Again, the daily books of a public prison are good evidence to prove the time of a prisoner's commitment or discharge (g), but not the cause of his commitment (h). So, the log-book of a convoy-man-of-war, transferred from the Admiralty to the Record Office (i), is evidence to prove the time of sailing, and the general motions, of the fleet (k). So, the books of the Sick and Hurt Office, and the muster-books of the Navy Office, which are now under the custody of the Master of the Rolls (l), are admissible to prove the death of a sailor, and the time when it occurred (m); and the latter books may also be read to show what ship the sailor belonged to, and the amount of wages due to him (n). In all these, and similar cases, the register does not prove the identity of the parties there named, with the parties in question; but that fact must be established by other proof, though slight evidence will, in most cases, be sufficient (o).

(c) *R. v. North Petherton*, 5 B. & C. 508, 510; *R. v. Lubbenham*, 5 B. & Ad. 968; *R. v. St. Katharine*, id. 970, n.

(d) *Cope v. Cope*, 1 M. & Rob. 271, 276, per Alderson, J.

(e) 6 & 7 Will. 4, c. 86, § 38, cited ante, § 1177, n. (y).

(f) 7 Will. 4 & 1 Vict. c. 22, § 8, enacts, "That it shall be lawful for the Registrar-General, if he shall think fit, to direct that the place of birth or death of any person, whose birth or death shall be registered under the said act for registering births, deaths, and marriages, shall be added to the entry, in such manner as the Registrar-General shall direct; and such addition, when so made, shall be taken to all intents to be part of the entry in the register."

(g) *R. v. Aickles*, 1 Lea. C. C. 191.

(h) *Salte v. Thomas*, 3 B. & P. 188.

(i) See ante, § 1095.

(k) *D'Israeli v. Jowett*, 1 Esp. 427; *Watson v. King*, 4 Camp. 275.

(l) See ante, § 1095.

(m) *Wallace v. Cook*, 5 Esp. 117; *R. v. Rhodes*, 1 Lea. C. C. 24; *Barber v. Holmes*, 3 Esp. 190.

(n) *R. v. Fitzgerald*, 1 Lea. C. C. 20; *R. v. Rhodes*, id. 24.

(o) *Birt v. Barlow*, 1 Doug. 170; *Bain v. Mason*, 1 C. & P. 202, 203, n.; *Barber v. Holmes*, 3 Esp. 190; *Wedgwood's case*, 8 Greenl. 75.

§ 1274. Land-tax assessments are, it seems, admissible to prove the assessment of the taxes upon the individuals and for the property therein mentioned; and, perhaps, they may be taken in connection with other facts, as some evidence of occupation or seisin (*p*). Again, the Bank-books are admissible, and indeed the best evidence, to prove the transfer of stock (*q*). So, the poll-books at a parliamentary (*r*) or municipal (*s*) election, are evidence of the votes given; but the custody of the latter must be strictly traced, so as to identify them as original papers (*t*). An entry in a vestry-book, stating the election of a treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of the election, and of its regularity (*u*). So, in an action for disturbing the plaintiff in the enjoyment of a pew, claimed in right of his messuage, an old entry in the vestry-book, signed by the churchwardens, stating that the pew had been repaired by a former owner of the messuage, under whom the plaintiff claimed, in consideration of his using it, was held to be admissible evidence in support of the plaintiff's right, as having been made by the churchwardens within the scope of their official authority (*x*). But old entries in a vestry-book, made by a churchwarden apparently not in the discharge of any public duty, and by which he has not charged himself, have been rejected (*y*).

§ 1275. Though the *register of a ship* may, as before stated (*z*), be proved by an examined copy, neither the copy nor the original can often be read in evidence in a court of justice; for, as the officer who writes the entry is not himself cognizant of the transactions entered, but simply relies on the declaration of one or more of the persons who claim to be owners, the register cannot,

(*p*) *Doe v. Seaton*, 2 A. & E. 170, 178; *Doe v. Arkwright*, id. 182, n.; 5 C. & P. 575, and 1 N. & M. 731, S. C.; *Doe v. Cartwright*, Ry. & M. 62; 1 C. & P. 218, S. C.; *Ronkendorff v. Taylor*, 4 Peters, 349, 360.

(*q*) *Breton v. Cope*, Pea. R. 30; *Marsh v. Collnett*, 2 Esp. 665.

(*r*) *Mead v. Robinson*, Willes, 422; 6 & 7 Vict. c. 18, §§ 94—96.

(*s*) *R. v. Ledgard*, 8 A. & E. 535.

(*t*) *Id.*; 5 & 6 Will. 4, c. 76, §§ 32, 35.

(*u*) *R. v. Martin*, 2 Camp. 100; *Hartley v. Cook*, 5 C. & P. 441.

(*x*) *Price v. Littlewood*, 3 Camp. 288, per Lord Ellenborough.

(*y*) *Cooke v. Banks*, 2 C. & P. 478.

(*z*) *Ante*, § 1175.

at common law, be received as a public document (*a*). Neither does the Registry Act render it admissible as evidence of the facts which it contains (*b*). The owners, therefore, cannot rely upon the register as evidence of their title, for it amounts to nothing more than their own declaration (*c*); neither can it be read as against a party named in it, who is sought to be charged as owner, unless it be confirmed by some auxiliary circumstance, showing that it was made by his authority or assent (*d*). Even where such connecting proof is given, it merely establishes the *legal* ownership in the vessel; and in an action brought against the owner for repairs, he is still at liberty to show that he has parted with the beneficial interest, and has ceased to interfere in the management of the ship; and that, in point of fact, the work was not done on his credit (*e*). Again, the register is not evidence for a defendant who seeks to prove a joint ownership in support of a plea in abatement (*f*); nor for a plaintiff suing on a policy of insurance, which he has effected as agent for certain persons, in whom the interest in the ship is alleged to be vested (*g*); neither is it admissible to prove that a vessel described therein as British built is in fact a British ship (*h*). Still, for some purposes, the register may be received even as conclusive evidence. For instance, if the object be to negative the ownership of some party, who is claiming title to a ship, the production of the register or certificate, in which his name is omitted, will conclusively defeat his claim (*i*). And, indeed, it is much to be regretted, that it is not rendered by statute good *prima facie* evidence of all its contents in every case;

(*a*) See 2 Phil. Ev. 114; *Weston v. Penniman*, 1 Mason, 306, 318, per Story, J.; *Bixby v. Franklin Ins. Co.*, 8 Pick. 86; *Colson v. Bonzey*, 6 Greenl. 474.

(*b*) 8 & 9 Vict. c. 89.

(*c*) *Flower v. Young*, 3 Camp. 241, per Lord Ellenborough.

(*d*) *Tinkler v. Walpole*, 14 East, 226; *Fraser v. Hopkins*, 2 Taunt. 5; *Cooper v. South*, 4 Taunt. 802.

(*e*) *Curling v. Robertson*, 7 M. & Gr. 336; *Young v. Brander*, 8 East, 10; *Jennings v. Griffiths*, Ry. & M. 42, per Abbott, C. J.; *Cox v. Reid*, id. 199, per Best, C. J.; *M'Iver v. Humble*, 16 East, 169.

(*f*) *Flower v. Young*, 3 Camp. 240.

(*g*) *Pirie v. Anderson*, 4 Taunt. 652.

(*h*) *Reusse v. Meyers*, 3 Camp. 475, per Lord Ellenborough.

(*i*) *Camden v. Anderson*, 5 T. R. 709, explained in *Tinkler v. Walpole*, 14 East, 229; *Marsh v. Robinson*, 4 Esp. 98.

for, as was justly observed by Lord Ellenborough, "there can be no doubt that in point of fact the register does almost invariably disclose the names of the true owners; and the practice of admitting it as *primâ facie* evidence would be extremely convenient" (*k*).

§ 1276. In other cases of a similar nature, but of infinitely less importance, the Legislature has interposed, and expressly made the register evidence. For instance, it was long considered that the copy of a stage-coach licence, kept at the licensing-office, was no evidence that the persons named therein were the owners of the coach (*l*); but it is now enacted, that a certified copy of the filed copy of any such licence shall be received against every person appearing by such copy to be named in such licence, as evidence of the same having been duly granted, and of its contents, and of every indorsement thereon (*m*); and among the particulars which must be specified in each licence, are the names and residences of all the proprietors (*n*). So, the registers of licences granted in respect of the metropolitan public carriages, would seem, by statute, to be sufficient proof of all things therein contained (*o*). So, the registers of copyright are made "*primâ facie* proof of the proprietorship or assignment of copyright or licence as therein expressed," and, "in the case of dramatic or musical pieces, are *primâ facie* proof of the right of representation or performance" (*p*).

§ 1277. We have seen that certified copies of the declarations of proprietorship of newspapers filed at the Stamp Office are, in all proceedings, civil and criminal, touching any newspaper, or any matter contained therein, *conclusive* evidence of the truth of the

(*k*) *Flower v. Young*, 3 Camp. 241. So, in *Pirie v. Anderson*, 4 Taunt. 656, Mansfield, C. J., observes, "It will be a great inconvenience to discontinue the practice of receiving these documents; and I wish that by Act of Parliament the register was made *primâ facie* evidence." See also, 8 & 9 Vict. c. 89, § 48, which inflicts a penalty of 500*l.* on any person making a false declaration, or falsifying any certificate or other document, made or obtained under that Act.

(*l*) *Strother v. Willan*, 4 Camp. 24, per Gibbs, C. J.

(*m*) 5 & 6 Vict. c. 79, § 10, cited ante, § 1177, n. (*x*).

(*n*) 2 & 3 Will. 4, c. 120, § 11.

(*o*) 6 & 7 Vict. c. 86, § 16, cited ante, § 1177, n. (*v*).

(*p*) 5 & 6 Vict. c. 45, § 11, cited ante, § 1112, n. (*z*); and 7 & 8 Vict. c. 12, § 8.

statements set forth in the declarations, as against every person who has signed them (*q*). Whether an action against the proprietors of a newspaper for the value of articles written by a contributor, is a proceeding touching a newspaper within the meaning of this provision, may admit of much doubt; but even if it be, the plaintiff cannot succeed, on merely producing a copy of the declaration signed by the defendants, if it appear that, in point of fact, the plaintiff's contract for the supply of the articles was exclusively made with a third party, being the real proprietor, upon his sole responsibility, and that consequently no credit was actually given to the defendants (*r*). So, certified copies of the memorials filed at the Stamp Office, either by banking copartnerships, or by joint-stock banks, are receivable in evidence; the former "as proof of the appointment and authority of the public officers named in such account or return, and also of the fact, that all persons named therein as members of such corporation or copartnership, were members thereof at the date of such account or return" (*s*); the latter, "as proof of the contents of such memorial" (*t*). If these memorials have not been filed within the time limited by the respective Acts, they cannot be received in evidence (*u*); and when they are admissible, they by no means preclude parties from having recourse to other proof of the facts contained in them (*x*).

§ 1278. The admissibility of the *books of corporations* depends, at common law, on the nature of the acts recorded. If these are obviously of a public character, and the entries have been made by the proper officer, they will be received in evidence either for or against the corporation (*y*); but if they relate to the private transactions of the corporate body, they will be inadmissible, except,

(*q*) Ante, § 1177, n. (*j*). See *Watts v. Lyons*, 6 M. & Gr. 1047.

(*r*) *Holcroft v. Hoggins*, 2 Com. B. 488.

(*s*) 7 Geo. 4, c. 46, §§ 4, 6; ante, § 1177.

(*t*) 7 & 8 Vict. c. 113, § 19; ante, § 1177.

(*u*) *Prescott v. Buffery*, 1 Com. B. 41.

(*x*) *Edwards v. Buchanan*, 3 B. & Ad. 788; *R. v. Carter*, 1 Den. C. C. 65.

(*y*) *R. v. Mothersell*, 1 Str. 93; *Thetford's case*, 12 Vin. Abr. 90, pl. 16; 2 Camp. 101, note.

perhaps, in actions between their own members (*z*). At common law, these books, whatever be the nature of the entries, can seldom be adduced by the corporation, in support of its own claims against a stranger (*a*); but by the statute law such books are not unfrequently rendered admissible. Thus, the books containing entries of the proceedings of joint-stock companies, and purporting to be signed by the presiding chairman, and to be sealed with the seal of the company, are *prima facie* evidence, not only of the proceedings of the meetings entered, "but of such meetings having been duly convened, and of the persons making or entering such orders or proceedings being shareholders or directors, and of the signature of the chairman" (*b*). So, the registers of shareholders in joint-stock banking companies, and in companies subject to the provisions of the Companies Clauses Consolidation Act, furnish *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares, in all actions for calls brought by the company (*c*); Parliament having, in these instances, disregarded the common-law rule, which prohibits a man from producing his own books as evidence for himself. Besides these examples, there are a great variety of semi-public books and documents, the admissibility and effect of which depend upon special legislative enactment; but as the most important of these have already been incidentally noticed while discussing the mode of proving public documents, it is not deemed expedient again to advert to them.

§ 1279. A *rule of law* of some practical value has of late years been established respecting the *mode of signing books*, which contain entries of the proceedings of commissioners, directors of companies, public trustees, and the like, at their general meetings. By a great variety of statutes, such books are rendered admissible as evidence of the proceedings entered in

(*z*) *Marriage v. Lawrence*, 3 B. & A. 144; *Gibbon's case*, 17 How. St. Tr. 810.

(*a*) *London v. Lynn*, 1 H. Bl. 214, n. (*s*); *Corporation of Waterford v. Price*, 9 Ir. Law R. 310; *Com. v. Woelper*, 3 Serg. & R. 29; *Highland Turnp. Co. v. McKean*, 10 Johns. 154.

(*b*) 7 & 8 Vict. c. 110, § 32.

(*c*) 7 & 8 Vict. c. 113, § 36; 8 & 9 Vict. c. 16, § 28.

them; but it not unfrequently happens that the Act contains a clause directing the chairman to subscribe his name to the minutes at each meeting. Notwithstanding this clause, the Courts have held, that the fact of the signature being attached *at the meeting*, is not a condition precedent to the admissibility of the entry, provided it has been signed at some future time by the person who actually presided as chairman (*d*). Considering the loose manner in which the directions contained in local and personal Acts are usually followed, this ruling has at least the advantage of being highly convenient.

§ 1280. While treating of the mode of proving certificates, we have already pointed out a considerable number of those documents, which are rendered by statute admissible evidence of the particular facts certified therein (*e*). To these it will not again be necessary to allude; but we may observe, that at common law, a certificate of a mere matter of fact, not coupled with any matter of law, cannot in general be received as evidence, even though given by a person in an official situation (*f*). If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person, and will therefore be rejected (*g*). So, where an officer's certificate is made evidence by statute of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed (*h*). Even the certificate of the Sovereign, under the sign-manual, cannot be received (*i*).

§ 1281. *Books and chronicles of public history* may be here

(*d*) *Southampton Dock Co. v. Richards*, 1 M. & Gr. 448; *Miles v. Bough*, 3 Q. B. 845; 3 G. & D. 119, S. C.

(*e*) *Ante*, § 1178, et seq.

(*f*) *Omichund v. Barker*, Willes, R. 549, 550.

(*g*) *Sewell v. Corp*, 1 C. & P. 392; *Drake v. Marryat*, 1 B. & C. 473; *Roberts v. Eddington*, 4 Esp. 88; *Waldron v. Coombe*, 3 Taunt. 162; 2 Ph. Ev. 125; *R. v. Sewell*, 8 Q. B. 161; *Oakes v. Hill*, 14 Pick. 442, 448; *Wolfe v. Washburn*, 6 Cowen, 261; *Jackson v. Miller*, id. 751; *U. S. v. Buford*, 3 Peters, 12, 29.

(*h*) *Johnson v. Hocker*, 1 Dall. 406, 407; *Governor v. Bell*, 3 Murph. 331; *Governor v. Jeffreys*, 1 Hawks, 207; *Stewart v. Alison*, 6 Serg. & R. 324, 329.

(*i*) *Omichund v. Barker*, Willes, R. 550.

mentioned, as partaking in some degree of the nature of public documents, and as being entitled, on the same principles, to a certain degree of credit. Any approved public and general history, therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of this or of any foreign country (*k*). But in regard to matters not of a public and general nature; such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible (*l*). A fortiori, peerages, army and navy lists, law lists, clergy lists, court guides, directories, university calendars, and other non-official publications of a similar nature, cannot be received in evidence, however useful they may be to the genealogist, in aiding his researches, and directing him to the sources from which the information contained in them was derived (*m*).

§ 1282. Old ecclesiastical *terriers*, which are returns of the temporal possessions of the church in every parish, made from time to time by virtue of the 87th canon, and deposited in the bishop's registry, or the registry of the archdeacon of the diocese, or, occasionally, in the chest of the parish church, are receivable in evidence, when proved to have come from the proper repository (*n*). Their admissibility appears to rest, partly upon the official character of the statements they contain, but principally upon the ground that they are admissions by persons, who stood in privity with the parties between whom they are sought to be used (*o*). On this last principle, old temporal surveys and

(*k*) B. N. P. 248, 249; case of Warren Hastings, referred to by Lord Ellenborough, in Picton's case, 30 How. St. Tr. 492; 2 Ph. Ev. 123; Neale v. Fry, cited 1 Salk. 281; Lord Bridgewater's case, cited Skin. 15; Morris v. Harmer, 7 Peters, 554.

(*l*) Steyner v. Droitwich, Skin. 623; 1 Salk. 281, S.C.; Piercy's case, Tho. Jones, 164; Leigh Peer. Min. Ev. 155; Evans v. Getting, 6 C. & P. 586, per Alderson, B.; 2 Ph. Ev. 123, 124; Hubback Ev. 699—701.

(*m*) Marchmont Peer. Min. Ev. 62, 77; Hub. Ev. 700—703.

(*n*) 1 St. Ev. 238, 239; B. N. P. 248. The repository need not be the *most proper* place of deposit. See ante, § 458, and Croughton v. Blake, 12 M. & W. 208.

(*o*) 2 Ph. Ev. 120.

maps will occasionally be admitted, though they cannot be received in evidence as public documents (*p*).

§ 1283. Before closing our remarks on the admissibility of public documents, it may be well to advert to *five practical rules* of some importance, all of which will be found applicable to evidence of every description. *First*, where evidence is offered for a *particular purpose*, and an objection is taken to its admissibility for that purpose, if the Court pronounces in favour of its *general admissibility* in the cause, a court of error, on exceptions taken, will support the decision of the Court below, provided the evidence be admissible for *any purpose* (*q*). The proper course for the opposing counsel to take in such a case would seem to be, to call upon the judge to explain to the jury, that the evidence, though generally admissible in the cause, furnishes no proof of the particular fact in question; and then, should the judge refuse to do so, his direction might be the subject of a distinct exception, or an application might be made to the Court above for a new trial on the ground of misdirection (*r*). *Secondly*, where inadmissible evidence is received at the trial *without objection*, the opposite party cannot afterwards object to its having been received, or obtain a new trial on the ground that the judge did not expressly warn the jury to place no reliance upon it (*s*). *Thirdly*, where evidence is objected to at the trial, the *nature* of the *objections* must be distinctly stated; and on moving for a new trial on account of its improper admission, the counsel will not be permitted to rely on any other objections than those taken at *Nisi Prius* (*t*). *Fourthly*, where evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge, and request him to make a note of the fact; and, if this request be refused, he should then tender a bill of exceptions. If this course has not been pursued, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the

(*p*) *Earl v. Lewis*, 4 Esp. 1; *Pollard v. Scott*, Pea. R. 19; *Wakeman v. West*, 7 C. & P. 479; *Doe v. Lakin*, id. 481.

(*q*) *The Irish Society v. Bp. of Derry*, 12 Cl. & Fin. 641, 665.

(*r*) Id. 672—674, per Lord Brougham.

(*s*) *Goalin v. Corry*, 7 M. & Gr. 342; *Doe v. Benjamin*, 9 A. & E. 644.

(*t*) *Williams v. Wilcox*, 8 A. & E. 314, 337; *Ferrand v. Milligan*, 7 Q. B. 730.

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evidence (u). *Lastly*, where evidence has been improperly admitted or rejected at the trial, the Court will grant a new trial, unless it be clear *beyond all doubt*, that the error of the judge could have had no *possible effect* upon the verdict (x).

(u) *Gibbs v. Pike*, 9 M. & W. 351, 360, 361.

(x) *Wright v. Doe d. Tatham*, 7 A. & E. 330; *Baron de Rutzen v. Farr*, 4 A. & E. 53, 57; *Crease v. Barrett*, 1 C. M. & R. 919, 933. These cases overrule *Doe v. Tyler*, 6 Bing. 561; 4 M. & P. 377, S. C.; a dictum of Lord Tenterden's in *Tyrwhitt v. Wynne*, 2 B. & A. 559; and one by Sir James Mansfield in *Horford v. Wilson*, 1 Taunt. 14. See *Mortimer v. M'Callan*, 6 M. & W. 75; *Edwards v. Evans*, 3 East, 451.

CHAPTER V.

OF PRIVATE WRITINGS.

§ 1284. THE only class of *written Evidence* which remains to be considered, is that of PRIVATE WRITINGS. And, in the discussion of this subject, it is not intended to mention separately each description of document comprised in this class; but to state the principles which govern the *inspection, production, proof, admissibility, and effect* of them all. And, first, as to the means of obtaining before the trial an INSPECTION or copy of such documents as are in the hands or power of the adverse party. This object will sometimes be attained without having recourse to a court either of law or equity; for, by the rules of pleading, if either party *claims or justifies* under a deed (*a*), *which is mentioned in his pleading* (*b*), and *which ought properly to be either in his possession, or under his control*, he must, unless he can allege, and if the allegation be traversed (*c*), prove, that the instrument has been lost or destroyed by time or accident (*d*), or that it is in the hands of his opponent (*e*), make *profert* of it, that is, profess to bring it into court to be shown to the Court and his adversary; and then, the adversary, by *craving oyer*, or, in other words, by demanding to have the deed read, will be entitled to an inspection of the original (*f*), as also to a verbatim copy of it, including the

(a) As to exceptions to this rule, see post, § 1287.

(b) Steph. Pl. 483.

(c) See an instance of an informal traverse, *Fisher v. Ford*, 12 A. & E. 654; 4 P. & D. 347, S. C.

(d) *Read v. Brookman*, 3 T. R. 151; *Hill v. Marsden*, 6 M. & W. 720, per Lord Abinger; *Hutchins v. Scott*, 2 M. & W. 816, per id. See *Hendy v. Stephenson*, 10 East, 55.

(e) *Wymarck's case*, 5 Rep. 75 (*a*); *Totty v. Nesbitt*, and *Matison v. Atkinson*, cited in *Read v. Brookman*, 3 T. R. 153; *Carver v. Pinkney*, 3 Lev. 82; *Fisher v. Ford*, 12 A. & E. 654; 4 P. & D. 347, S. C.

(f) *Abp. of Canterbury v. Tubb*, 3 Bing. N. C. 789; *Hill v. Marsden*, 6 M. & W. 720, per Lord Abinger.

attestations and names of the witnesses (*g*), on payment of a reasonable charge (*h*).

§ 1285. So strict is the rule requiring profert, where the party is *entitled* to the possession of the deed mentioned in his pleading, that the omission to make profert will only be excused in cases of *extreme necessity* (*i*), such as those just pointed out; and therefore it has been held insufficient to allege, that "the deed was delivered to the opposite party," without stating that it was then in his possession, or what had become of it (*k*). So, where a defendant relied upon a deed, whereby he had assigned his property to trustees for the benefit of his creditors, and the creditors, including the plaintiff, had released him from his debts, the Court held that he was bound to make profert of the instrument, though he averred in his plea that it was in the possession of the trustees, who refused to deliver it to him for the purpose of bringing it into court (*l*). Chief Baron Pollock observed in this case, that the refusal of the trustees might render them liable in damages to the defendant, but would not warrant any departure from a rule, which was made, not for the vexation of parties, but for very sound reasons (*m*).

§ 1286. In some cases even, profert must be made, though the party is not strictly entitled to the possession of the instrument; as, for instance, where the party pleading acts as servant to another, or where there is a privity of interest between them, as in the case of a release to a reversioner, of which the tenant for life may avail himself, if he can get hold of it. So, in the case of heirs or executors, who may plead a release to the ancestor or testator whom they respectively represent; as also in that of several tort feisors; for in all these cases there is a privity between the parties, which constitutes an identity of person (*n*). Subject

(*g*) Longmore v. Rogers, Willes, R. 288.

(*h*) See Steph. Pl. 72—74, 482—486; 1 Wms. Saund. R. 9—9 d.

(*i*) Hill v. Marsden, 6 M. & W. 720, per Alderson, B.

(*k*) Wallis v. Harrison, 4 M. & W. 538.

(*l*) Hodgson v. Warden, 13 M. & W. 22; Hill v. Marsden, 6 M. & W. 718.

(*m*) Hodgson v. Warden, 13 M. & W. 24.

(*n*) Bain v. Cooper, 8 M. & W. 763, 764, per Parke, B.

to these exceptions, the general rule undoubtedly is, that a party is not required to make profert of an instrument, to the possession of which he is not entitled (*o*). Therefore, where to debt on bond the defendant pleaded the plaintiff's bankruptcy, and the plaintiff replied that, before his bankruptcy, he had assigned the bond by deed to certain persons, for whose benefit the action was prosecuted, it was held that no profert need be made of the deed of assignment, as it was an instrument adverse to the plaintiff's title, and one to the possession of which he had no right (*p*). So, where a surety by deed-poll guaranteed to a plaintiff the payment of a sum of money, the Court held, in an action of covenant on the deed, that the defendant might plead that his principal had been released by the plaintiff, without making profert of the indenture of release (*q*).

§ 1287. This rule applies to *all deeds*, excepting *feoffments* made before the 2nd of October, 1845 (*r*), and conveyances which operate by force of the *Statute of Uses*; as, for instance, the old lease for a year in a conveyance by lease and release. The reason why such feoffments are excepted seems to be, that the estate did not pass by the feoffment, but by the livery and seisin; and therefore, the showing of the feoffment to the Court would not enable them to determine the right of the party (*s*). The exception, so far as it relates to deeds operating under the Statute of Uses, probably arose from the circumstance, that such a deed, being in form a conveyance to A. to the use of B., was considered as in A.'s possession, and, consequently, when B. pleaded it, the judges did not require him to make profert. Hence it follows, that in pleading a conveyance by lease and release, though no profert need be made of the lease, it must of the release; for, although the bargain and sale for a year operates by force of the statute, yet, as the release operates at common law, and in favour of the party to whom it is executed, he must

(*o*) *Dangerfield v. Thomas*, 9 A. & E. 298, per Coleridge, J.; recognised in *Bain v. Cooper*, 8 M. & W. 753, per Parke, B.

(*p*) *Dangerfield v. Thomas*, 9 A. & E. 292; 1 P. & D. 287, S. C.

(*q*) *Bain v. Cooper*, 8 M. & W. 751; 1 Dowl. N. S. 11, S. C.

(*r*) When 8 & 9 Vict. c. 106, §§ 2, 3, came into operation. See *ante*, § 722.

(*s*) *Jenkin v. Peace*, 6 M. & W. 729, per Lord Abinger; *Banfill v. Leigh*, 8 T. R. 573, per Lord Kenyon.

produce it, as being 'the person who is presumed to have the possession of it (*s*). The rule is *confined to deeds*, with the single exception of *probates* and *letters of administration*, of which instruments executors and administrators must make profert, at least when they sue as plaintiffs (*t*). But no profert need be made of a sealed will or an award, for such instruments do not fall within the technical definition of a deed (*u*).

§ 1288. The *reasons* assigned in *Dr. Layfield's case* (*v*), for the *rule requiring profert*, are, first, that the judges may have an opportunity, by inspection, of ascertaining whether the deed be sufficient in law, and whether it contain any material erasures or interlineations (*x*); and next, that the opponent may be enabled to take advantage of any condition, limitation, or power of revocation, contained in the instrument. Mr. Serjeant Stephen, however, suggests, upon reasonable ground, that the practice *originated* in no views of this kind, but that it may be traced to a remote antiquity, when the production of the deed was regarded as a distinct method of proof, independent of that by jury. "As the pleader," says he, "of that day concluded in some cases by offering to prove by jury, or by the record, so in others, he maintained his pleading by producing a deed as proof of the case alleged" (*y*). It matters little which of these two views be correct; for whatever be the origin or ancient object of the rule, most people will now readily admit, that it is one which should be carefully preserved, as being highly conducive to the attainment of substantial justice.

§ 1289. The judges are so convinced of the utility of this practice, that, in the exercise of their equitable jurisdiction, they have long been in the habit of compelling, almost as a matter of course, the *inspection of all documents*, which are *set forth* and

(*s*) *Jenkin v. Peace*, 6 M. & W. 722, 730, 731; *Bolton v. Bp. of Carlisle*, 2 H. Bl. 262, per Heath, J.; *Banfill v. Leigh*, 8 T. R. 573.

(*t*) Steph. Pl. 483. Semble, they are not bound to make profert when they plead the probate or letters as defendants. See *Marsh v. Newman*, Popham, 163, 164.

(*u*) Steph. Pl. 483; 2 Wms. Saund. R. 62 b.

(*v*) 10 Rep. 92; cited in *Jenkin v. Peace*, 6 M. & W. 728, 729.

(*x*) See post, § 1320.

(*y*) Steph. Pl. 485, 486.

relied upon by either party in his *pleading*, and which are of such a kind as not strictly to require proof (z). Thus, if a party bring an action upon a bill of exchange, a promissory note, a policy of insurance (a), or a written agreement, the defendant may, in general, obtain an inspection of the document declared upon, by applying to the Court, or, more conveniently, to a judge at chambers (b). But, in order to ensure success, the application should be supported by the affidavit of the party, stating the special circumstances which render the inspection necessary; as, for instance, that the party has no recollection of ever having executed such an instrument, or that he has reason to believe that it has been altered since it was signed, or the like (c). However, as this is a matter entirely for the discretion of the judge, an order to inspect *may*, and by some judges will, be granted in simple cases, without any such affidavit (d). Still, if it appear that the object of the defendant in seeking an inspection is vexatious, as, if it be suggested that he wishes to plead in abatement the non-joinder of other parties to the instrument, the Court will not entertain the application (e). Neither will they interfere, so as to enable the defendant to fish out a defence, although they will grant an inspection for the purpose of assisting him in pleading a particular plea (f).

§ 1290. In some cases, it may happen that a plaintiff is desirous of bringing an action upon an *instrument* which is *in the hands* of his *opponent*; and here, if the plaintiff has executed, or is otherwise interested in, the instrument, and cannot safely declare

(z) Steph. Pl. 486, 487.

(a) In actions on policies of insurance, the judges appear on one or two occasions to have made general orders that the assured should produce, *upon affidavit*, to the underwriters, *all the papers* in his possession relative to the cause; see *Goldsmidt v. Marryat*, 1 Camp. 562; *Clifford v. Taylor*, 1 Taunt. 167: sed qu.

(b) *Woolmer v. Devereux*, 2 M. & Gr. 758; *Blogg v. Kent*, 6 Bing. 614; *Thomas v. Dunn*, 6 M. & Gr. 274.

(c) *Woolmer v. Devereux*, 2 M. & Gr. 759, per Tindal, C. J.

(d) *Id.*, 2 M. & Gr. 758; 9 Dowl. 672, S. C., nom. *Woolner v. Devereux*.

(e) *Beal v. Bird*, 2 D. & R. 419.

(f) *Birmingham Bristol and Thames J. Rail. Co. v. White*, 1 Q. B. 286—288. This, and the case cited in the preceding note, seem to overrule a dictum of Gibbs, J., in *King v. King*, 4 Taunt. 667.

without inspecting it (*g*), the Court, or rather the judge, for these applications are generally best made at chambers (*h*), will regard the holder in the light of a trustee, and will compel him to produce the document, so as to enable the plaintiff to read it, or to take a copy of it (*i*), or to get it duly stamped (*k*). Nor is this all; for although the instrument be not the direct foundation of the action or defence, but be merely matter of evidence to be used at the trial; still, if after having been executed by the two litigating parties, or by persons in privity with them, without a counterpart, it has been lodged in the hands of the one party for the use of both, the Court on motion, or a judge at chambers on summons, will generally compel its production, on the ground that the holder must, in such case, be deemed a mere trustee for the opposite party (*l*). So, if the party seeking to inspect the instrument has executed it, though the holder has not (*m*); or if the applicant, without having actually signed the deed, is legally interested in it, the Court will usually compel the inspection prayed (*n*); but they will never interfere to enforce the production of a document, to which the applicant is neither party nor privy, and in which he has no legal interest (*o*). The question which is uniformly asked by the judges in cases of this nature, is, whether or not the deed or other instrument has been deposited in the hands of the holder

(*g*) *Rowe v. Howden*, 4 Bing. 539, n., per Park, J.; *Mayor of Arundel v. Holmes*, 8 Dowl. 119, per Coleridge, J.

(*h*) *Reid v. Coleman*, 2 Cr. & Mee. 456.

(*i*) *Blakey v. Porter*, 1 Taunt. 386; *King v. King*, 4 Taunt. 666; *Morrow v. Saunders*, 1 B. & B. 318; 3 Moore, 671, S. C.; *Mayor of Arundel v. Holmes*, 8 Dowl. 118; *Davenoge v. Bouverie*, 8 Bing. 1. As to the American authorities, see *Jackson v. Jones*, 3 Cowen, 17; *Wallis v. Murray*, 4 Cowen, 399; *Denalow v. Fowler*, 2 Cowen, 592; *Davenport v. McKinnie*, 5 Cowen, 27; *Utica Bk. v. Hillard*, 6 Cowen, 62.

(*k*) *Bateman v. Phillips*, 4 Taunt. 157; *Reid v. Coleman*, 2 Cr. & Mee. 456; *Bousfield v. Godfrey*, 5 Bing. 418.

(*l*) 2 Ph. Ev. 195; *Bateman v. Phillips*, 4 Taunt. 157; *Gigner v. Bayly*, 5 Moore, 71; *Charnock v. Lumley*, 5 Scott, 438; *Reid v. Coleman*, 2 Cr. & M. 456; *Steadman v. Arden*, 4 Dowl. & L. 16; 15 M. & W. 587, S. C.

(*m*) *Morrow v. Saunders*, 1 B. & B. 318; 3 Moore, 671, S. C.

(*n*) *Bateman v. Phillips*, 4 Taunt. 157; *Browning v. Aylwin*, 7 B. & C. 204.

(*o*) *Smith v. Winter*, 3 M. & W. 309; *Cocks v. Nash*, 9 Bing. 723; *Lawrence v. Hooker*, 5 Bing. 6; *Rundle v. Beaumont*, 4 Bing. 537; *Rowe v. Howden*, id. 538, n.; *Ratcliffe v. Bleasby*, 3 Bing. 148; *Taylor v. Osborne*, cited 4 Taunt. 159; *Goodliff v. Fuller*, 14 M. & W. 4; *Pickering v. Noyes*, 1 B. & C. 262.

as a *trustee* for the applicant only, or at least for the applicant jointly with himself; and unless this question be answered in the affirmative, the application cannot be entertained (*p*). Neither will a court of law, unless directed by statute (*q*), ever compel the production of a private document, excepting at the instance of a party to a civil suit actually pending, and for the purpose of assisting such party in the inquiry involved therein (*r*).

§ 1291. In several cases, a rule to inspect has been granted, though the party opposing the motion was not himself possessed of the document, where it appeared that he had some *legitimate control over it*; as where it was lodged with his agent (*s*), or his attorney (*t*), or even with the attorney of a company of which he was a director (*u*), or the like. The Court will seldom, if ever, interfere to compel a mere *stranger* to the suit to produce a document in his custody, in order that one of the parties may inspect it (*x*); but where a demise had been executed by the lessor and lessee, and the latter had assigned it by way of mortgage, the Court, in an action of ejectment brought by the lessor for a forfeiture, made a rule absolute, which called upon the mortgagee to show cause why he should not allow the lessor to inspect and take a copy of the lease (*y*).

§ 1292. In all cases where a party seeks to inspect an instrument held by his opponent in which he has an interest, he should state in his affidavit that he is not himself possessed of any copy,

(*p*) *Pickering v. Noyes*, 1 B. & C. 262; *Blogg v. Kent*, 6 Bing. 615, per Tindal, C. J.

(*q*) Post, § 1294.

(*r*) 2 Ph. Ev. 199, 200; *Ex parte Partridge*, 1 Har. & W. 350.

(*s*) *Gigner v. Bayly*, 5 Moore, 71.

(*t*) *Morrow v. Saunders*, 3 Moore, 671.

(*u*) *Steadman v. Arden*, 4 Dowl. & L. 16; 15 M. & W. 587, S. C.

(*x*) *Cocks v. Nash*, 9 Bing. 723. In *Parkhurst v. Gosden*, 2 Com. B. 894, the Court refused to compel the judge of the sheriff's court in London to furnish the defendant with a copy of the notes taken by him on a former trial between the same parties, though the defendant moved upon an affidavit that the notes were necessary for his defence, in order to enable him to cross-examine the plaintiff's witnesses.

(*y*) *Doe d. Morris v. Roe*, 1 M. & W. 207.

and that no counterpart was ever executed (*z*) ; for it has been held, that if a party were to lose his counterpart of a deed, he would not be entitled to call upon his adversary to produce the other copy (*a*) for his mere inspection ; though, perhaps, in such a case, the Court would compel the production of the other copy at the Stamp Office for the purpose of being stamped (*b*).

§ 1293. It seems at one time to have been considered that, as no man is compellable to furnish evidence which may render him liable to a criminal prosecution, the Court would not order the inspection of documents on a suggestion of *forgery* (*c*) ; but this doctrine no longer prevails ; and it is now the constant practice for judges at chambers to make such orders, when the applicant has reason to believe that the instrument on which his opponent relies has been forged (*d*). The judges, however, will not in this, or, indeed, in any case, compel the party to whom the writing belongs to deposit it with a master of the Court, or with any other person ; but, allowing the owner to keep *possession* of the document, they will merely order him to permit his adversary and the witnesses to inspect it in his hands (*e*).

§ 1294. In some few cases facility is given for the inspection of private documents by the express provisions of statutes. Thus, by § 5 of the Act of 53 Geo. 3, c. 141, persons liable to pay annuities or rent-charges, certain particulars of which are required by that Act to be enrolled in Chancery, may obtain a copy of any deed, bond, instrument, or other assurance, whereby the annuity or rent-charge was granted, by giving twenty-one days' notice in writing to the person entitled to such annuity or rent-charge, and by

(*z*) *Morrow v. Saunders*, 1 B. & B. 318 ; *Griffin v. Smythe*, 8 Dowl. 490 ; *Lord Portmore v. Goring*, 4 Bing. 152 ; 12 Moore, 363, S. C.

(*a*) *Street v. Brown*, 6 Taunt. 302 ; *Woodcock v. Worthington*, 2 You. & J. 4.

(*b*) *Neale v. Swind*, 1 Dowl. 314 ; 2 Cr. & J. 278, S. C. ; *Travis v. Collins*, 2 Cr. & J. 625 ; 2 Tyr. 726, S. C.

(*c*) *Chetwind v. Marnell*, 1 B. & P. 271, per Gibbs, C. J. ; *Hildyard v. Smith*, 1 Bing. 451 ; 8 Moore, 586, S. C.

(*d*) *Thomas v. Dunn*, 6 M. & Gr. 274 ; *Woolmer v. Devereux*, 2 M. & Gr. 759 ; 3 Scott, N. R. 224 ; 9 Dowl. 673, S. C. ; *Richey v. Ellis*, 1 Alc. & Nap. 111.

(*e*) *Thomas v. Dunn*, 6 M. & Gr. 274.

paying a reasonable sum for such copy; and the holder of the original instruments is directed to allow the person to whom such copies shall be sent, to examine them with the originals; and in the event of the payee of the annuity or rent-charge, or the holder of the original instruments, refusing to comply with these provisions, application may be made to any judge of the Queen's Bench or Common Pleas, who will thereupon make such order as he may think proper.

§ 1295. Such appear to be the principal rules, so far as they can be gathered from a multitude of not very consistent decisions, by which the judges at common law are now guided in granting or refusing applications for the inspection of documents. Lord Mansfield, indeed, in the last century, was anxious to place this equitable and useful jurisdiction of the common-law judges upon a broader basis, and repeatedly held that, in order to avoid the expense and delay of a bill in Chancery, the courts of common law should compel inspection in all cases, where a discovery might be obtained by application to a court of equity (*f*). But this enlightened doctrine has not met with the sanction and approval of succeeding judges; its rejection being probably caused by some vague impression, that, inasmuch as courts of law have not, like courts of equity, any compulsory power of examining on oath either of the parties to the cause, they have not the machinery requisite for enforcing a fitting discovery.

§ 1296. Now, it is submitted with some confidence, that this is an erroneous view of the subject; for where the object is merely to inspect and take copies of papers in the possession or power of an opponent, no *compulsory* examination of the holder is required, and courts of common law have ample power to administer justice between the parties. This proposition may be illustrated by referring to a recent case in the Court of Exchequer (*g*). There, an action had been brought by a lady for breach of promise of marriage, and the defendant applied to the Court for leave to inspect two letters in the plaintiff's possession. The affidavit on

(*f*) *Barry v. Alexander*, 4 Doug. 15.

(*g*) *Goodliff v. Fuller*, 14 M. & W. 4.

which the motion was founded stated, that the letters in question had been written by the plaintiff to the defendant; that, in consequence of a quarrel, they had been returned to the lady; and that they contained a release of the defendant's promise. The Court refused the rule, observing that the plaintiff could not be considered as a trustee of these letters for the defendant, and that consequently the matter of the application was the subject of a bill in equity. No doubt this decision was strictly conformable with the present rule of law relating to the inspection of documents. But the question is, why should such a rule exist? The Court, though it could not directly compel a discovery, had undoubtedly the power in this case, as in all others of a similar nature, to receive affidavits on both sides; and the plaintiff therefore *might* have denied on oath, either that she had the letters in her possession or under her control, or that they established or tended to establish the defendant's case; and had she filed an affidavit containing any such denial, the Court would of course have been justified in refusing to interfere. But where, in a case of this nature, the supposed holder of the document declines to use the means of defence which the law affords, and to make the necessary affidavit, with what show of reason can he complain of injustice, if the Court determines to give credit to the undenied statements of the applicant, and to order the inspection prayed? (*h*) *Qui tacet consentire videtur*, is a maxim of common sense; and it certainly does appear but little consistent with popular notions of justice, that a party should be driven to commence a second suit in a separate court, for the mere purpose of enabling him to prosecute the first. Surely Lord Abinger was right, when he observed, that "the courts of common law should be possessed of sufficient power, in all cases of actions properly brought before them, to oblige the parties to do justice to each other without having recourse to a bill in equity." Those who look to the history of the common law, from the accession of Lord Mansfield to his high station in the Court of King's Bench, will perceive, that if the same liberal and enlightened spirit had always prevailed in courts of common law, many of the difficulties in the way of suitors would long since have vanished (*i*).

(*h*) Wigram on Disc. § 302. (*i*) 1st Rep. of Com. on Courts of Com. Law, App.

§ 1297. However, as our object here is not so much to suggest what the law ought to be, as to point out what it is, we forbear to advance any further arguments on this subject ; but, hoping that the time may soon arrive, when courts of law will be empowered by the Legislature to examine on oath the litigants themselves, and when, consequently, *all bills of discovery* in aid of actions at law will be rendered nugatory, we only think it right to state, that, at present, an inspection of documents may often be obtained by filing a bill in Chancery, though an application for leave to inspect would inevitably be refused at common law. In these cases, the party seeking the inspection may perhaps apply to the common-law court for a postponement of the trial, until he shall have had an opportunity of resorting to a court of equity, unless his opponent will consent to produce the documents required (*k*) ; or he may effect the same object in a more strictly legal mode, by obtaining an injunction out of Chancery to stay further proceedings at common law.

§ 1298. It remains then to be seen in what cases a party, by filing *a bill of discovery* in equity, may obtain an inspection of documents in his opponent's possession. And here it may be generally observed, that, while courts of equity recognise no distinction between public and private documents (*l*), or between deeds and other less formal writings (*m*), they will compel discovery in aid of *civil rights only* ; and therefore, unless the defendant waives the objection to their authority, they will never enforce an inspection of documents to aid either the prosecution of, or the defence to, an indictment or information (*n*). Neither will a court of equity interfere, any more than a court of law, where the discovery sought would subject the defendant to any criminal proceeding, penalty,

(*k*) *Goodliff v. Fuller*, 14 M. & W. 5, 6, per Pollock, C. B., and Alderson, B. ; *Whitter v. Cazalet*, 2 T. R. 683. See *Clark v. Allbut*, 4 Dowl. 684 ; *Grant v. Ridley*, 5 M. & Gr. 201. See also *Calliand v. Vaughan*, 1 B. & P. 210 ; and *Att.-Gen. v. Bovet*, 15 M. & W. 70, 71.

(*l*) See ante, § 1106.

(*m*) *Wigram on Disc.* § 400.

(*n*) *Lord Montague v. Dudman*, 2 Ves. Sen. 397, per Lord Hardwicke ; *Glyn v. Houston*, 1 Keen, 329 ; *Macanlay v. Shackell*, 1 Bligh, N. S. 126, et seq., per Lord Eldon ; *Wigram on Disc.* § 10.

or forfeiture (*o*), or would violate the rules which relate to professional privilege (*p*). Subject to these exceptions, any party to an action at law, whether he be plaintiff or defendant (*q*), is entitled in equity to exact from his opponent a discovery of the evidences, and therefore to inspect and take copies of the writings, which relate either to his case alone (*r*), or to his case as well as to that of his opponent (*s*); but he has no right whatever to a discovery of the evidences, or to an inspection of the writings, which either relate exclusively to his adversary's case (*t*), or are not material to the issues about to be tried at law (*u*).

§ 1299. The *mode of obtaining the inspection required* is well explained by Vice-Chancellor Wigram (*x*). "The plaintiff alleges in his bill (in effect), that the defendant has in his possession or power, deeds, papers, and writings *relating* to the matters mentioned in the bill; and that, by the contents of such deeds, papers, and writings, if the same were produced, the truth of the plaintiff's case would appear. The defendant is then required by the bill to admit or deny the truth of these allegations; if he admits having possession or power over any such deeds, documents, or writings, he is required by the bill, and is *primâ facie* bound, to describe them, either in the body of his answer, or in the schedule to it. The plaintiff then moves the Court that the defendant may be ordered to produce and leave in the hands of his clerk in court the deeds, papers, and writings so described, with liberty for the plaintiff to inspect them and take copies thereof." Though this mode of proceeding has of late years been substituted for the more cumbrous course of requiring the defendant to set out the contents of the documents in his answer, the orders for production

(*o*) Ante, §§ 1068, 1078, 1106; Wigram on Disc. §§ 127—147, 442.

(*p*) Ante, § 660, et seq. Wigram on Disc. §§ 136—138, 442.

(*q*) Wigram on Disc. § 87.

(*r*) Wigram on Disc. §§ 23, 26, 284.

(*s*) *Smith v. Duke of Beaufort*, 1 Hare, 520; 1 Phill. 220, S. C.; *Burrell v. Nicholson*, 1 Myl. & K. 680; *Bolton v. Corp. of Liverpool*, 1 Myl. & K. 88; *Att-Gen. v. Lambe*, 3 Y. & Coll. Ex. R. 162; Wigram on Disc. §§ 325, 367; *Combe v. Corp. of London*, 1 Y. & Coll. C. C. 631; 15 Law J. N. S. Ch. 80, S. C.

(*t*) *Bolton v. Corp. of Liverpool*, 1 Myl. & K. 88; 3 Sim. 467, S. C.; *Smith v. Duke of Beaufort*, 1 Hare, 520; 1 Phill. 220, 221, S. C.

(*u*) Wigram on Disc. §§ 224—237.

(*x*) Wigram on Disc. § 285.

still rest upon the principle that the documents are *part* of the defendant's compulsory *examination*; and consequently, at the trial at law, the plaintiff cannot read the writings produced without putting in the entire answer of the defendant, and thus affording him the benefit of any explanation he may have given respecting them (*y*).

§ 1300. As in all cases where a discovery of the contents of papers is prayed, the *onus* is upon the plaintiff to prove his right thereto, and the only evidence on which he can rely is the defendant's *admission* (*z*); it follows that a court of equity will not make an order for inspection of documents, unless the plaintiff can show from the defendant's *answer* (*a*), or from his *affidavit* in the nature of a supplemental answer (*b*), first, that the writings in question are in the *possession* or power of the defendant (*c*); and next, that they are *relevant* to his own case (*d*), or, in other words, that he has an *interest* in their production for the purpose of the trial about to take place, either as affording affirmative evidence of some right or title belonging to him (*e*), or as tending to disprove the title or case of his opponent, by showing some specific defect therein (*f*).

§ 1301. Though the Court will consider all documents to be in the defendant's power, which he admits to be in the hands of his *agent*, or of any other person under his *control* (*g*), it will not in general order the production of papers, where it appears by the

(*y*) *Smith v. Duke of Beaufort*, 1 Hare, 524; *Brown v. Thornton*, 1 Myl. & Cr. 243; *Miller v. Gow*, 1 Y. & Col. C. C. 56; *Wigram on Disc.* § 285.

(*z*) *Wigram on Disc.* § 293; *Storey v. Lord George Lennox*, 1 Myl. & Cr. 534.

(*a*) *Wigram on Disc.* § 294.

(*b*) *Wigram on Disc.* § 293. As to these affidavits, see *Llewellyn v. Badeley*, 1 Hare, 527, and cases there cited; *Morrice v. Swaby*, 2 Beav. 500; *Gardner v. Dangerfield*, 5 Beav. 389.

(*c*) *Wigram on Disc.* § 294.

(*d*) *Wigram on Disc.* §§ 299—301.

(*e*) *Wigram on Disc.* § 295.

(*f*) *Smith v. Duke of Beaufort*, 1 Phill. 209; 1 Hare, 507, S. C.; *Glasscott v. Copper Miners' Co.*, 11 Sim. 305; *Combe v. Corp. of London*, 1 You. & Coll. C. C. 631; 15 Law J. N. S. Ch. 80, S. C.; *Harris v. Harris*, 4 Hare, 179.

(*g*) *Wigram on Disc.* § 294; *Ex parte Shaw, Jacob*, 272; *Morrice v. Swaby*, 2 Beav. 500; ante, § 1291.

defendant's answer, that he has a *joint* possession of them with somebody else who is not before the Court (*h*); but in these cases, the plaintiff must either make all the parties interested parties to the suit (*i*), or he may compel the defendant to furnish in his answer a full discovery of the contents of these documents (*k*); and should he adopt this latter course, and should the papers be in the custody of some person who holds them for the defendant and the other parties interested, the defendant must still answer the interrogatories respecting their contents; for every defendant is bound to inspect, and answer as to the contents of, all documents that are in his possession or power; and all which he has a *right* to inspect, provided he can enforce that right, are in his *power* (*l*). We may add, that no valid objection can be taken to an order for the production of memoranda, which are admitted by the defendant to relate to the matters in dispute, and to be in his possession, on the ground that they are intermingled with other entries in the same book, to a discovery of which the plaintiff is not entitled, and which cannot be separated or sealed up (*m*).

§ 1302. With respect to the *production* of documents at the trial, little need here be said; for we have already seen, that, since parol evidence of the contents of writings cannot be given as primary proof, the party who relies upon a document must either produce it, or give such satisfactory reason for its non-production as will justify him in having recourse to secondary evidence (*n*). If, therefore, the paper be lost or destroyed, or if its production be physically impossible or highly inconvenient, the particular fact relied on must be proved (*o*); if it be in the custody of a stranger, he must be served with a writ of subpoena duces

(*h*) *Murray v. Walter*, Cr. & Ph. 114, 124, 125, per Lord Cottenham; *Taylor v. Rundell*, Cr. & Ph. 111, per id.; *Lopez v. Deacon*, 6 Beav. 254; *Wigram on Disc.* § 294.

(*i*) *Lopez v. Deacon*, 6 Beav. 258, per Lord Langdale; *Wigram on Disc.* §§ 294, 327.

(*k*) *Lopez v. Deacon*, 6 Beav. 258; *Taylor v. Rundell*, 1 Phill. 222.

(*l*) *Taylor v. Rundell*, 1 Phill. 226, per Lord Lyndhurst.

(*m*) *Carew v. White*, 5 Beav. 172. Those who wish for more detailed information respecting bills of discovery are referred to Vice-Chancellor Wigram's able treatise on that subject.

(*n*) *Ante*, § 312.

(*o*) *Ante*, §§ 312, 313, 323.

tecum (*q*); and if it be in the hands or power of the adverse party, the practice in general is, to give him or his attorney a regular notice to produce it at the trial (*r*). Not that, on proof of such notice, the adversary is compellable to furnish evidence against himself; but the notice is given, as we have before explained, to lay a foundation for the introduction of secondary evidence of the contents of the document, by showing that the party has done all in his power to insure the production of the original.

§ 1303. Where notice has been given to the opponent to produce papers in his possession or power, the *regular time for calling for their production*, is not until the party who requires them has entered upon his case; till which time the other party may, in strictness, refuse to produce them, and no cross-examination as to their contents is then allowable (*s*). Still, it is considered rigorous to insist upon this rule, and as a close adherence to it would be productive of inconvenience, the judges are very unwilling to enforce it (*t*). The production of papers upon notice does not make them evidence in the cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence (*u*). The reason for this rule is, that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties. If a party, after notice, refuses to produce a document, he cannot, when the adverse side has given secondary evidence of its contents, put it in as part of his case (*v*).

§ 1304. If the instrument, on its production, appears to have been *altered*, it is a general rule that *the party offering it in evidence must explain* this appearance, *if called upon to do so by the*

(*q*) Ante, § 338.

(*r*) Ante, § 325, et seq.

(*s*) *Graham v. Dyster*, 2 Stark. R. 23.

(*t*) *Sideways v. Dyson*, 2 Stark. R. 49; *Calvert v. Flower*, 7 C. & P. 386, per Lord Denman.

(*u*) *Calvert v. Flower*, 7 C. & P. 386.

(*v*) *Doe v. Hodgson*, 2 M. & Rob. 281.

issue raised (x); because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion (*y*). If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored. It was formerly a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made cotemporaneously with the execution of the instrument (*z*); at the present day, however, the law presumes nothing (*a*), but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made (*b*). These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide, not on conjecture, but on proof (*c*).

§ 1305. The rule of law applicable to this subject is, that any *material alteration* in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps also with this additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it (*d*). This rule, which was originally propounded with respect to deeds (*e*), probably because, in former days, most written

(*x*) *Parry v. Nicholson*, 13 M. & W. 779, per Parke, B.; ante, §§ 209, 213, post, § 1320.

(*y*) *Henman v. Dickinson*, 5 Bing. 183; 2 M. & Pay. 289, S. C.; *Clifford v. Parker*, 2 M. & Gr. 910; *London and Brighton Railway Co. v. Fairclough*, id. 705, per Tindal, C. J.; *Earl of Falmouth v. Roberts*, 9 M. & W. 471.

(*z*) *Trowel v. Castle*, 1 Keb. 22. As to alterations in wills, see ante, § 109.

(*a*) *Johnson v. Duke of Marlborough*, 2 Stark. R. 278, per Abbott, J.

(*b*) *Bishop v. Chambre*, M. & M. 116; 3 C. & P. 55, S. C.; *Taylor v. Mosely*, 6 C. & P. 273; *Cariss v. Tattersall*, 2 M. & Gr. 890. All these questions are of course determined in the first instance by the Court, when they are raised upon a preliminary objection to the admissibility of the instrument; but they are again open to the jury. *Ross v. Gould*, 5 Greenl. 204.

(*c*) *Knight v. Clements*, 8 A. & E. 215; 3 N. & Per. 375, S. C.; *Clifford v. Parker*, 2 M. & Gr. 909; *Byrom v. Thompson*, 11 A. & E. 33.

(*d*) *Davidson v. Cooper*, 11 M. & W. 778, 799, 802; 13 M. & W. 343, S. C. by Ex. Ch. See post, §§ 1311—1313. (*e*) *Pigot's case*, 11 Rep. 27.

engagements were drawn in that form (*f*), has since been extended to negotiable securities (*g*), bought and sold notes (*h*), guarantees (*i*), and policies of assurance (*k*); and may now be said to apply equally to all written instruments, which constitute the evidence of contracts (*l*).

§ 1306. The grounds of this doctrine are twofold. The first is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud, without running any risk of losing by the event in case of detection (*m*). The other is, to insure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned (*n*). Besides these grounds, which are common to all altered written instruments, a third reason for the rule, chiefly as it applies to bills of exchange and promissory notes, may be found in the necessity which obtains for protecting the revenue arising from the stamp laws (*o*); but with respect to these laws it should be observed, that it is immaterial whether the alteration were made with or without the consent of the parties to the instrument (*p*).

§ 1307. In saying that an instrument will be rendered void by any *material* alteration, indefinite language is of necessity employed, but a short reference to some of the leading cases on this subject will serve, in a great measure, to explain what constitutes materiality. Thus, any alteration in negotiable securities, as to the date (*q*), amount, or time of payment (*r*); the insertion of

(*f*) *Master v. Miller*, 4 T. R. 330, per Lord Kenyon.

(*g*) *Id.*; 2 H. Bl. 141, S. C. in error. (*h*) *Powell v. Divett*, 15 East, 29.

(*i*) *Davidson v. Cooper*, 11 M. & W. 778.

(*k*) *Forshaw v. Chabert*, 3 B. & B. 158; 6 Moore, 369, S. C.; *Fairlie v. Christie*, 7 Taunt. 416; 1 Moore, 114; *Holt*, N. P. R. 331, S. C.; *Campbell v. Christie*, 2 Stark. R. 64, per Lord Ellenborough.

(*l*) *Davidson v. Cooper*, 11 M. & W. 802.

(*m*) *Master v. Miller*, 4 T. R. 329, per Lord Kenyon.

(*n*) *Sanderson v. Symonds*, 1 B. & B. 430, per Dallas, C. J.

(*o*) *Mason v. Bradley*, 11 M. & W. 594, per Parke, B.; *Davidson v. Cooper*, *id.* 787, per *id.*

(*p*) *Bowman v. Nichol*, 5 T. R. 537.

(*q*) *Outhwaite v. Luntley*, 4 Camp. 179, per Lord Ellenborough; *Walton v. Hastings*, *id.* 223; 1 Stark. R. 215, S. C., per *id.*; *Cardwell v. Martin*, 9 East, 180.

(*r*) *Bowman v. Nichol*, 5 T. R. 537; *Alderson v. Langdale*, 3 B. & Ad. 660.

collected by W. S. P. R. 47

words to limit or vary the consideration as originally expressed (*t*); the introduction of a place for payment (*u*); the substitution of one place for another (*x*); the converting a joint, into a joint and several, responsibility (*y*); or, it seems, the cutting off the signature of one of several co-promisers in a joint and several note (*z*);—will, at common law, as against any party *not consenting* thereto, invalidate the instrument, even in the hands of an innocent holder; and will for the most part prove equally fatal, by virtue of the stamp laws, though made by consent of all parties (*a*). So, where a sold note was altered, without the knowledge of the purchaser, by inserting an additional term into the contract (*b*),—and where an agreement was apparently converted into a deed, by affixing seals to the signatures of the parties (*c*),—the respective instruments were held to be vitiated; and, in short, any alteration which causes an agreement or other writing to speak a language different, in legal effect, from what it originally spoke, is material.

§ 1308. On the other hand, the insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error, will not constitute a material alteration, even though made without consent; neither will an instrument be avoided by virtue of the stamp laws, though it be altered after execution in a material particular, provided the parties agree to make such alteration, in order to correct a mistake, and in furtherance of their original intention. Thus, where, subsequent to the execution of a policy, the insured inserted some

(*t*) *Knill v. Williams*, 10 East, 431.

(*u*) *Macintosh v. Haydon*, Ry. & M. 362, per Abbott, C. J.; *Crotty v. Hodges*, 4 M. & Gr. 561; 5 Scott, N. R. 221, S. C.; *Cowie v. Halsall*, 4 B. & A. 197.

(*x*) *Tidmarsh v. Grover*, 1 M. & Sel. 735; *R. v. Treble*, 2 Taunt. 329; *R. & R.* 164, S. C.

(*y*) *Perring v. Hone*, 4 Bing. 28; 12 Moore, 135; 2 C. & P. 401, S. C.

(*z*) *Mason v. Bradley*, 11 M. & W. 590. See *Nicholson v. Revill*, 4 A. & E. 675; 6 N. & M. 192, S. C. The removing, however, of the seal of one of several obligors does not, in the case of a *several* bond, render it void as to the others. *Collins v. Prosser*, 1 B. & C. 682; 3 D. & R. 112, S. C.

(*a*) *Chit. on Bills*, 181—185; 1 *Smith's Lead. Cas.* 490.

(*b*) *Powell v. Divett*, 15 East, 29.

(*c*) *Davidson v. Cooper*, 11 M. & W. 784; 13 M. & W. 353, S. C., in Ex. Ch.

words which gave him no power to do any one thing which he could not have done under the policy as it originally stood, the Court held that the instrument was not vacated (*d*); and the affixing an additional maker's name to a joint and several note after it had issued, has been held not to invalidate the instrument as against the original makers, as this act was considered, not in the light of an alteration, but simply as an addition which had no effect (*e*). So, in a bond conditioned for the payment of 100*l.*, where the word "hundred" had been accidentally omitted in the second place in which the sum was mentioned, its insertion by a stranger was held to be immaterial (*f*); and where, in a note intended to be negotiable, the words "or order" had been left out by mistake, their insertion by the holder, with the consent of the maker, was held neither to vitiate the instrument nor to render a new stamp necessary (*g*).

§ 1309. It is not, however, on every occasion of a party tendering an instrument in evidence, that he is bound to explain any material alteration that appears upon its face; but only on those occasions, when he is *seeking to enforce it, or claiming an interest under it*. The extent and meaning of this rule may be well illustrated by the following cases. A party became tenant of a farm from year to year, and subsequently signed an agreement respecting the mode of tillage. His landlord brought an action for not cultivating the land according to the terms of the agreement, and the instrument, when produced, contained an erasure in the habendum, the term of years being altered from

(*d*) *Sanderson v. Symonds*, 1 B. & B. 426; 4 Moore, 42, S. C.; *Clapham v. Cologan*, 3 Camp. 382, per Lord Ellenborough.

(*e*) *Catton v. Simpson*, 8 A. & E. 136; 3 N. & P. 248, S. C. Sed qu.; and observe, the alteration in this case was made by consent. See also *Gould v. Coombs*, 1 Com. B. 543.

(*f*) *Waugh v. Bussell*, 5 Taunt. 707.

(*g*) *Byrom v. Thompson*, 11 A. & E. 31; *Kershaw v. Cox*, 3 Esp. 246; *Jacob v. Hart*, 6 M. & Sel. 142; *Brutt v. Picard*, Ry. & M. 37; *Robinson v. Touray*, 1 M. & Sel. 217; *Farquhar v. Southey*, M. & M. 14; *Eagleton v. Gutteridge*, 11 M. & W. 465. For American cases connected with this subject, see *Hunt v. Adams*, 6 Mass. 519, 522; *Smith v. Crooker*, 5 Mass. 538; *Hale v. Russ*, 1 Greenl. 335; *Knapp v. Maltby*, 13 Wend. 587; *Brown v. Pinkham*, 18 Pick. 172.

seven to fourteen. The Court held that the landlord was not bound to explain this alteration, since, the holding being under a parol agreement, which incorporated only so much of the written instrument as was applicable to a yearly holding, the duration of the term therein mentioned, whether seven or fourteen years, was immaterial. It was altogether dehors the agreement, and quite independent of the contract which the parties had entered into, to farm the land according to the stipulations of that agreement. "The rule of law," said Mr. Baron Parke, "applies, where the obligation is by reason of the instrument; here the obligation is by reason of the parol contract of the parties, quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year, as to which an alteration in the term of years is wholly immaterial" (h). So, in the case of *Hutchins v. Scott* (i), which was an action for an excessive distress, the plaintiff, in order to prove the amount of rent really due, put in the agreement for the lease of a house, No. 35, which was in fact the house occupied by him. The number originally inserted in the instrument was 38, and the jury found that this had been altered to 35 after the execution of the agreement, and without the defendant's knowledge. The Court held that, as the demise was admitted on the record, the altered agreement might be given in evidence to show the terms of the holding. "I do not think," said Lord Abinger, "when the case is rightly understood, that the question arises whether an alteration even by the plaintiff ought to avoid the agreement. If it does, the only consequence would be, that it would be impossible for him to maintain an action upon it as on a demise; but it is quite a different question whether it can be given in evidence. *It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact.* * * * No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws. * * Here, however, it is sufficient to decide that this agreement was evidence to prove the terms of the holding;

(h) *Earl of Falmouth v. Roberts*, 9 M. & W. 471.

(i) 2 M. & W. 809.

and there was no evidence of any other holding than that of the house No. 35" (k).

§ 1310. So also, a deed is not rendered inadmissible by alteration, if it be "produced merely as proof of some right or title created by, or resulting from, its *having been executed*; as in the case of an ejectment to recover lands which have been conveyed by lease and release, or now by release only (l). There, what the plaintiff is seeking to enforce is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, then the alteration of the deed in any material point after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover" (m). In like manner, if the estate lies *in grant*, as a watercourse, and cannot exist without deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone (n).

§ 1311. In the case of *Davidson v. Cooper* above cited (o), the old doctrine, that every material alteration of an instrument, *even by a stranger*, and *without the privity of either party*, avoids that instrument, has been recognised and adopted by the Court of Exchequer, and has been held to apply in all

(k) 2 M. & W. 815—817.

(l) 4 & 5 Vict. c. 21.

(m) *Davidson v. Cooper*, 11 M. & W. 800, per Lord Abinger. See also *Dr. Leyfield's case*, 10 Rep. 88; *Bolton v. Bishop of Carlisle*, 2 H. Bl. 259; *Doe v. Hirst*, 3 Stark. R. 60.

(n) *More v. Salter*, 3 Bulst. 79, per Coke, C. J.; Roll. R. 188; *Lewis v. Payn*, 8 Cowen, 71.

(o) Ante, § 1305.

cases where the altered instrument is relied on as the foundation of a right sought to be enforced (o). The supporters of this doctrine contend that it creates no real hardship, since the party whose right of action is defeated by the alteration has his remedy by an action on the case against the spoliator (p); but this argument is entitled to little weight, since the spoliator may either be a child, or other irresponsible agent, or be utterly incompetent to pay any damages; and if it be further urged, as was done by the Judges of the Exchequer Chamber in the same case (q), that it is the duty of the party who has the instrument in his possession to take proper care of it, this at least assumes that the alteration is made while the instrument is in his custody, and consequently cannot support the broad proposition stated above. Indeed, it may perhaps be still questioned, whether the sound rule of law can be carried further than this, that any party, seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made, either before its execution, or at a time when the instrument was not in his possession, or under his control; and that unless he can establish one or other of these facts, the instrument will be vitiated.

§ 1312. However, since the case of *Davidson v. Cooper* (r), it appears to be clearly established in England, that no party can rely on a document which has been altered while in his custody, though he be in a position to prove most positively, that the alteration was the effect of pure accident or mistake, or was made without his privity or consent by some person, over whom he could

(o) *Davidson v. Cooper*, 11 M. & W. 779, 800.

(p) *Markham v. Gonaston*, Cro. Eliz. 626; 11 M. & W. 791.

(q) "After much doubt, we think the judgment (of the Court of Exchequer) right. The strictness of the rule on this subject, as laid down in *Pigot's case*, can only be explained on the principle, that a party, who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part." Per Lord Denman, in pronouncing the judgment of the Ex. Ch., 13 M. & W. 352.

(r) 11 M. & W. 778; 13 id. 343, S. C.

exercise no control. Yet this doctrine seems to accord but little with common notions of justice and equity, and is scarcely consistent with several cases, decided in conformity with the custom of merchants, in which it has been held that the cancellation by mistake of a cheque or bill does not invalidate the instrument (*s*). The doctrine is also opposed to the case of *Lady Argoll v. Cheney* (*t*), where a deed to lead the uses of a recovery was held good, though the seals had been torn off by a little boy; and to the case of *Henfree v. Bromley* (*u*), where an award was sustained, though the umpire, after it had been made, altered the amount, leaving the original sum awarded still legible. It must, however, be conceded, that these last two decisions are of less authority on this particular point, as they possibly turned on the distinction mentioned above, between an instrument constituting the foundation of a right, and that which simply furnishes evidence of some right, resulting from its execution (*x*).

§ 1313. Be this as it may, it certainly deserves notice, that, according to a decision in the Irish Court of Exchequer, an instrument is not rendered void in Ireland by any alteration in it, which an unauthorised stranger may make (*y*); neither, in America, is the doctrine recognised to the extent now established in England; but unless some fraudulent intent be brought home to the party claiming under the instrument, the unwarranted alteration of a writing by a stranger

(*s*) *Raper v. Birkbeck*, 15 East, 17; *Fernandey v. Glynn*, 1 Camp. 426; *Wilkinson v. Johnson*, 3 B. & C. 428; 5 D. & R. 403, S. C.; *Novelli v. Rossi*, 2 B. & Ad. 757; *Warwick v. Rogers*, 5 M. & Gr. 340.

(*t*) Palm. 402. "So, in any case where the seal is torn off by accident after plea pleaded; (see 1 Roll. Rep. 40, also cited in *Pigot's case*, 11 Rep. 27, and *Michael v. Scocckwith*, Cro. Eliz. 120, in both which cases the Court on this ground held that the mutilated instrument was the deed of the party on non est factum,) and in these days, I think, even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt on that point by stating the truth of the case:" per Buller, J., in *Master v. Miller*, 4 T. R. 339. "The profert," however, "of a deed without a seal will not support the allegation of a deed with a seal," *id.*; and if a party choose to plead a deed with a profert, he will fail unless he produces it; *Smith v. Woodward*, 4 East, 585; but perhaps in some cases, the Court would now give him leave to amend the record, under 3 & 4 Will. 4, c. 42, § 23. See ante, § 145, et seq. (*u*) 6 East, 309. (*x*) See § 1310, ante.

(*y*) *Swiney v. Barry*, Jones, Ex. R. 109.

is treated as a merely accidental spoliation, which in that country does not vitiate the instrument (*z*). In the case of the *United States v. Spalding* (*a*), Mr. Justice Story strongly condemns the English doctrine, as repugnant to common sense and justice,—as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven,—and as a rule, which ought to have the support of unbroken authority, before a court of law should feel bound to surrender its judgment to what deserves no better name than a technical quibble. In these observations the American judge has been supported by Mr. Baron Alderson, who, in *Hutchins v. Scott* (*b*), remarked, “It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, or what the parties meant.”

§ 1314. It has been much doubted whether an *immaterial* alteration, though made by the *obligee himself*, will avoid the instrument, provided it be done innocently, and to no injurious purpose (*c*). But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important, whether it be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule, established for the prevention of mal-practices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences (*d*).

(*a*) *Cutts v. U. S.*, 1 Gall. 69; *U. S. v. Spalding*, 2 Mason, 478; *Rees v. Overbaugh*, 6 Cowen, 746; *Lewis v. Payn*, 8 Cowen, 71; *Jackson v. Malin*, 15 Johns. 297, per Platt, J.; *Nicholls v. Johnson*, 10 Conn. 192; *Marshall v. Gougler*, 10 Serg. & R. 164. (a) 2 Mason, 482. (b) 2 M. & W. 814.

(*c*) *Sanderson v. Symonds*, 1 B. & B. 426; *Hatch v. Hatch*, 9 Mass. 311, per Sewell, J.; *Smith v. Dunbar*, 8 Pick. 246. In *Farquhar v. Southey*, M. & M. 14, the acceptance of a bill was signed “Southey & Crowder;” the bill was originally addressed to “Messrs. Southey, Crowder, & Co.,” but the address was altered to correspond with the acceptance. Held, that this was an immaterial alteration, and that the acceptors were not discharged, per Littleale, J.

(*d*) *Pigot's case*, 11 Rep. 27; cited *arguendo*, in 4 T. R. 322, and 11 M. & W. 789; *Shep. Touch.* 68; *Sanderson v. Symonds*, 1 B. & B. 430, per Dallas, C. J. If an obligee procure a person, who was not present at the execution of the bond,

§ 1315. We have seen that, in order to render the alteration fatal it must be made *after the execution or other completion of the instrument*. These words are, in general, sufficiently explicit; but there are two classes of cases, in which embarrassing questions respecting their interpretation have arisen. The first class comprehends *policies of assurance, composition deeds, and other settlement deeds*, in which several parties with independent interests, joining to effect some general purpose, execute one common deed at different times. By considering such deeds as instruments of a peculiar nature, embracing separate contracts with different individuals, the strict rule of law has been, to a certain degree, eluded (e); and it has been held that any alterations made during the progress of such transactions, still leave the deeds valid as to the parties previously executing them, provided such alterations have not affected the situation in which these parties stood (f).

1316. *Negotiable securities* constitute the second class, respecting which little difficulty arises in regard to the time when an alteration will be deemed fatal, if made without consent; because that time is calculated from the date of the making, accepting, drawing, or indorsing of the instrument by the party against whom it is produced; but the question is, at what precise period will a bill or note be considered complete, so that any subsequent alteration, whether made with or without consent of the parties, will invalidate the instrument by reason of the *stamp laws*? In answer to this question, it may be broadly stated, that a negotiable security is complete, as soon as, but not until, it becomes an *available* instrument, or, in other words, when it is in the hands of a party who can make a valid claim upon it. Thus, on the one hand, an accommodation bill may be altered after it has been drawn, accepted, and indorsed, provided it has not been passed to a *bonâ fide* holder for value (g); and a bill for value, if unendorsed, is not

to sign his name as an attesting witness, this is *primâ facie* evidence of fraud, and avoids the bond. *Adams v. Frye*, 3 Metc. 103.

(e) *Davidson v. Cooper*, 11 M. & W. 802, per Lord Abinger. See *West v. Steward*, 14 M. & W. 47, cited post, § 1318.

(f) *Doe v. Bingham*, 4 B. & A. 675, per Bayley, J., recognised in *Hibblewhite v. M'Morine*, 6 M. & W. 215.

(g) *Downes v. Richardson*, 5 B. & A. 674; 1 D. & R. 332, S. C. See *Cardwell v. Martin*, 9 East, 190.

deemed complete till its acceptance (*h*) ; nor, it seems, even then, unless it be absolutely returned to the payee (*i*). On the other hand, every material alteration, whether made before or after acceptance, or with or without consent, will invalidate a bill, whether it be drawn for accommodation or for value, if it be once issued to a person who, as a holder for valuable consideration, is entitled to sue any prior party thereon (*k*).

§ 1317. The principles above stated with respect to negotiable securities, apply equally to other instruments ; and therefore where a bond, after execution, but before it had passed to the obligee, was altered, by inserting, with the consent of the parties, the name of an additional obligor, the Court held that it was not vacated, and that no new stamp was required (*l*). The same point was ruled in *Jones v. Jones* (*m*), where a marriage settlement had been executed by the conveying party, but, before it was executed by the other parties, or had passed into the hands of the persons who were to take under it, a clause was objected to and struck out, after which the deed was re-executed. The question in these cases is, whether, taking into consideration all the circumstances, the matter was or was not in fieri ; and that, to use Mr. Preston's language, " depends on the inquiry, whether the intended grantor has given sanction to the instrument so as to make it conclusively his deed " (*n*). Perhaps it may be stated, as a general rule, that the transaction will be deemed incomplete, and consequently that an alteration may be effected, if the deed remain in the grantor's possession, or be placed in the hands of a third party as an agent for him, provided there be nothing to show that it was intended to operate immediately, and was accepted as an effectual deed by

(*h*) *Kennerly v. Nash*, 1 Stark. R. 452, per Lord Ellenborough.

(*i*) *Sherrington v. Jermyn*, 3 C. & P. 374, per Lord Tenterden.

(*k*) *Outhwaite v. Luntley*, 4 Camp. 179 ; *Walton v. Hastings*, id. 223 ; 1 Stark. R. 215, S. C. See further on this subject, *Chitty on Bills*, 186—189.

(*l*) *Matson v. Booth*, 5 M. & Sel. 223 ; see *Zouch v. Clay*, 1 Ventr. 185 ; 2 Keb. 872, 881 ; 2 Lev. 35, S. C.

(*m*) 1 Cr. & M. 721 ; 3 Tyr. 890, S. C. See also *Spicer v. Burgess*, 1 C. M. & R. 129 ; 4 Tyr. 598, S. C. ; *Murray v. Earl of Stair*, 2 B. & C. 88 ; 3 D. & R. 278, S. C. ; *Johnson v. Baker*, 4 B. & A. 440.

(*n*) 3 Prest. on Abstracts, 64.

the party in whose favour it was made (o). So, if the instrument be delivered as an *escrow*, not to take effect as a deed until a certain event has happened (p). If, however, the *grantor has once parted with all control over the deed*, it can no longer be altered, though it has not been actually delivered to the party in whose favour it was made (q). Thus, where A. executed a deed transferring certain railway shares to B., and, having received the purchase-money from B.'s brokers, delivered to them the instrument, the transaction was held to be perfected at common law, though B. had not executed the deed, and though the Railway Act directed that, on every sale of shares, the deed should be executed by both parties; and therefore, the name of C. being afterwards substituted for B., and the deed re-executed by the seller, the Court held that it could not operate as a conveyance to C. without a fresh stamp (r).

§ 1318. Questions of nicety have sometimes arisen respecting the validity of instruments, which have been *executed in blank*, and subsequently filled up; and distinctions have been recognised, first, between deeds and other instruments; and secondly, as to deeds, between the insertion of matter essential to their operation, and that which is not so essential. Thus, writs and subpoenas may, it seems, be sealed in blank, and then filled up (s); and an acceptance written on a blank piece of stamped paper, may be afterwards converted into a bill of exchange, to the extent of such sum as the stamp will cover (t). So, also, it appears that blanks may be filled up in a deed, after its execution, if the omission did not render it

(o) See cases cited in note (m) ante.

(p) *Hudson v. Revett*, 5 Bing. 269; 2 M. & P. 663, S. C.; explained by Alderson, B., in *West v. Steward*, 14 M. & W. 49. See also cases cited in note (m) ante. The question whether a deed was executed as an *escrow* is one for the jury, who should look to all the facts attending the execution, and are not now bound, as formerly, to find in the negative, if no express words have been used declaratory of such an intention. *Bowker v. Burdekin*, 11 M. & W. 128, 147.

(q) *Doe v. Knight*, 5 B. & C. 671; 8 D. & R. 348, S. C.

(r) *The London and Brighton Railway Co. v. Fairclough*, 2 M. & Gr. 674, 705. Perhaps, if the Railway Company, who produced and relied upon the altered deed, had shown that B.'s name had originally been inserted by *mistake*, no new stamp would have been requisite. See ante, § 1308.

(s) See 6 M. & W. 207, *arguendo*.

(t) *Schultz v. Astley*, 2 Bing. N. C. 552, per Tindal, C. J.

a nullity, and the matter inserted carry out the original intention of the grantor, or be introduced with his consent (*u*). Thus, where a party, being abroad, executed a power of attorney, whereby he appointed "— Ree of Ware" his attorney, and Mr. Ree, to whom the power was delivered, and who, according to the evidence, was the party intended to be authorised by it, inserted his Christian name in the blank space, it was held that the instrument was not invalidated, though possibly some objection might have been taken with respect to the stamp laws (*v*). So, where a debtor had assigned his property by deed to trustees for the benefit of his creditors, "whose names and the amount of whose debts were set out in a schedule thereunto annexed," the Court held that the deed was valid, though at the time of its execution by the debtor, no schedule was annexed, but when the deed was produced in evidence one was appended, containing the signatures of the creditors, some of which had been erased, and others had no sums set against them (*x*). But if an instrument, at the time of its execution, was, by reason of some material deficiency, incapable of operating as a deed, it cannot afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, unless such stranger be authorised by instrument under seal; for if this were permitted there would be a violation of the principle, that an attorney, to execute and deliver a deed for another, must himself be appointed by deed (*z*). Thus, where a proprietor of railway shares executed a conveyance of three shares with the name of the purchaser in blank, it was held that nothing passed by this deed, and that an agent appointed by parol could not afterwards, in the absence of his principal, introduce the name of a vendee (*a*); and where a deed contained a covenant to deliver to the covenantee certain articles "as per schedule annexed," and the schedule was not annexed at the time of execution, the Court decided that its subsequent annexation, in the absence of one of the parties, did not give it operation

(*u*) *Markham v. Gonaston*, Cro. El. 626; *Moor*, 547, S. C.; *Zouch v. Clay*, 1 Vent. 185; 2 Keb. 872, 881; 2 Lev. 35, S. C.

(*v*) *Eagleton v. Gutteridge*, 11 M. & W. 465.

(*x*) *West v. Steward*, 14 M. & W. 47.

(*z*) *Hibblewhite v. M'Morine*, 6 M. & W. 214, 216, per Parke, B. See ante, § 718.

(*a*) *Id.* p. 200, overruling *Texira v. Evans*, cit. 1 Anst. 228.

as part of the deed, and consequently that the instrument was insensible and void (*b*).

§ 1319. It should be observed that these last two cases turned partly on the fact that the deficiency was supplied in the absence of the granting and contracting party; and indeed, had not this been the case, the decisions would possibly have been different; for on the principle adopted in *Hudson v. Revett* (*c*), if a blank in a material part of a deed be filled up after execution, and the party be present at the time and ratify the act, this will amount to evidence of re-delivery, and the deed will be held valid. In that case, the defendant executed and delivered a deed conveying his property to trustees, for the benefit of his creditors, the particulars of whose demands were stated therein; but a blank was left for one of the principal debts, the exact amount of which was subsequently ascertained and inserted in the deed, in the grantor's presence, and with his assent, by the attorney who had prepared the deed, and had it in his possession, he being one of the trustees. The defendant having afterwards recognised this instrument as valid in various transactions, the Court, considering that it was originally executed as an escrow, and was not intended to be a perfect deed till all the blanks were filled up, held that the act of the grantor, in assenting to the filling of the blank, amounted to a re-delivery of the deed thus completed (*d*).

(*b*) *Weeks v. Maillardet*, 14 East, 568, noticed by Parke, B., in 6 M. & W. 215; and in *West v. Steward*, 14 M. & W. 48. *See Oyer & Green v. Sa. R. 71*

(*c*) 5 Bing. 269; 2 M. & P. 663, S. C.; explained by Alderson, B., in *West v. Steward*, 14 M. & W. 49.

(*d*) The same effect was given to clear and unequivocal acts of assent in pais by a feme mortgagor, after the death of her husband, as amounting to a re-delivery of a deed of mortgage, executed by her while a feme covert. *Goodright v. Straphan*, 1 Cowp. 201, 204; *Shep. Touch. by Preston*, p. 58. "The general rule," said Mr. Justice Johnson, in delivering the judgment of the Court, in *Duncan v. Hodges*, 4 M'Cord, 239, "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed; and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order, in the manner of execution, but in the end makes it perfect, before the delivery, it is a good deed."

§ 1320. It only remains to be seen how far the *form of pleading* will vary the effect of an altered instrument tendered in evidence, in cases where the action is brought upon the instrument, whether in its original or its altered form. First, if the action be brought on an instrument *not under seal*, in its *original* form, and the defendant merely plead non assumpsit, or, in the case of a bill or note, that he did not accept, indorse, or make such a security, the plaintiff will recover, though he produce an altered instrument in support of his case, if he can show that the alteration was made subsequently to the completion of the writing (e); unless the alteration be of such a nature as to render a new stamp necessary, in which case the objection to the admissibility of the instrument produced can be taken under such pleas (f). Should the defendant intend to rely on the alteration, as either establishing a new contract, if made with consent of the parties, or as putting an end to the original agreement, if made without his consent, he must plead these facts specially, by way of discharge (g). Secondly, if the action be brought on an instrument *under seal*, in its *original* form, and the defendant plead non est factum without craving oyer, the principles above stated would seem to apply, though the question has never yet been expressly decided; but if, in such case, the defendant should crave oyer, and set out the deed as altered, we conceive that he might take advantage of the alteration under non est factum; for the deed, as set out on oyer, becomes parcel of the record, and the only question at the trial would then be, whether the deed, as set out on the plea, was executed or not by the defendant (h). Thirdly, if the plaintiff declare on an instrument, *whether under seal or not*, in its *altered* form, and the alteration be *material*, it seems on principle, though a recent decision throws much doubt upon the subject (i), that, under the plea of non est

(e) *Hemming v. Trenery*, 9 A. & E. 926; 1 P. & D. 661, S. C.; *Davidson v. Cooper*, 11 M. & W. 778; *Mason v. Bradley*, id. 590.

(f) *Calvert v. Baker*, 4 M. & W. 417, as explained by Parke, B., in *Mason v. Bradley*, 11 M. & W. 594, and in *Davidson v. Cooper*, id. 787. See *Crotty v. Hodges*, 4 M. & Gr. 561.

(g) See cases cited above, n. (e). As to the form of such plea, see *Atkinson v. Hawdon*, 2 A. & E. 628; 4 N. & M. 409, S. C.; *Davidson v. Cooper*, 11 M. & W. 787.

(h) 1 Chit. on Pl. 449, 450.

(i) *Parry v. Nicholson*, 13 M. & W. 778.

factum, non assumpsit, non-acceptance, or the like, the defendant will succeed, unless the plaintiff can prove that the alteration was effected previously to the completion of the instrument ; for, if this be not the case, the defendant only asserts the truth, when he says, " I did not make the promise, or sign the writing, on which you declare " (j). Lastly, the declaration may be drawn in so general a form, as to *suit equally the original or the altered instrument*. In such case, it is highly probable, that the principle established in *Hemming v. Trenery* (k) would be held to apply, and that the defendant would not be allowed to object to the alteration under a general plea.

§ 1321. Notwithstanding the rule of law which requires the party, tendering in evidence an altered instrument, to explain its appearance, it is now decided, at least with respect to letters and ancient documents coming from the right custody, that the mere fact of their being in a *mutilated or imperfect state*, will not throw upon the party producing them the burthen of proving when, by whom, or for what purpose, they were mutilated ; but such documents will be received, though the mutilation be evidently not accidental, provided that a sufficient portion of the instrument remains to explain its general nature and effect, and it can be shown that it is produced in the same state in which it was actually found. The weight due to such a document may be a just matter of comment, and in many cases the jury would regard it as utterly valueless ; still there is no legal objection against its being presented to their notice, such as it is ; and the right enjoyed by the opponent, of insisting that the whole instrument shall be read, is not infringed by its admission, since that rule merely provides that no part of the deed, in the state in which it actually is, shall be withheld from the jury without the consent of the adverse party (l).

§ 1322. If the instrument, on being produced, appear to be signed by *subscribing witnesses*, one of them, at least, *must be*

(j) *Cock v. Coxwell*, 2 C. M. & R. 291 ; 4 Dowl. 187, S. C. ; *Weeks v. Mailardet*, 14 East, 568. See ante, § 213.

(k) 9 A. & E. 926 ; 1 P. & D. 661, S. C.

(l) *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 763, 774, 775 ; *Evans v. Rees*, 10 A. & E. 151.

called to prove its execution. Various reasons have been assigned for this rule; but those upon which it seems best founded, are, first, that the attesting witnesses have been solemnly chosen by the parties to the instrument, as the persons on whose testimony they wish to rely (*l*); and, secondly, that they may fairly be presumed to know more of the circumstances connected with the execution than mere strangers, and, being in general disinterested, are more likely to state the facts correctly than the parties themselves, who, moreover, are in many instances incapable of being called (*m*). So inexorable is this rule, that it applies even to a cancelled (*n*), or a burnt (*o*) deed; as also to one, the execution of which is admitted by the party to it (*p*); and that too, though such admission be deliberately made, either in open court (*q*), or in a subsequent agreement (*r*), or even in a sworn answer to a bill of discovery filed against the party in the cause (*s*). So, also, the attesting witness must be called, though, subsequently to the execution of the deed, he has become blind (*t*); and the Court will not dispense with his presence on account of illness, however severe (*u*). If the

(*l*) In *Cussons v. Skinner*, 11 M. & W. 168, Lord Abinger stated that it was necessary to call the subscribing witness, "because the party, to whose execution he is a witness, is considered as invoking him as the person to whom he refers, to prove what passed at the time of the attestation."

(*m*) In *Call v. Dunning*, 4 East, 54, 55, Le Blanc, J., observed, "A fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and he is intitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." (*n*) *Breton v. Cope*, Pea. R. 44.

(*o*) *Gillies v. Smither*, 2 Stark. R. 528.

(*p*) *Abbot v. Plumbe*, 1 Doug. 216, referred to by Lawrence, J., in 7 T. R. 267, and in 2 East, 187; and confirmed by Lord Ellenborough as an inexorable rule, in *R. v. Harringworth*, 4 M. & Sel. 353. See also, *Mounsey v. Burnham*, 1 Hare, 15. The same rule prevails in America. See *Fox v. Reil*, 3 Johns. 477; *Henry v. Bishop*, 2 Wend. 575.

(*q*) *Johnson v. Mason*, 1 Esp. 89, per Lord Kenyon, citing Lord Mansfield to the same effect.

(*r*) *Doe v. Penfold*, 8 C. & P. 536, per Patteson, J. Sed vide *Bringloe v. Goodson*, 5 Bing. N. C. 740, per Tindal, C. J.

(*s*) *Call v. Dunning*, 4 East, 53. Sed vide *Bowles v. Langworthy*, 5 T. R. 366; and 1 Doug. 216, n. (F). See also post, § 1326.

(*t*) *Cronk v. Frith*, 9 C. & P. 197, per Lord Abinger; 2 M. & Rob. 262, S. C. See contrà, *Wood v. Drury*, 1 Lord Ray. 734; *Holt's R.* 734, S. C.; and *Pedler v. Paige*, 1 M. & Rob. 258, where Parke, B., reluctantly yielded to the authority of Lord Holt.

(*u*) *Harrison v. Blades*, 3 Camp. 457, per Lord Ellenborough; see contrà, *Jones*

indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him on interrogatories (*x*); and if he be taken suddenly ill, a motion must be made to postpone the trial (*y*).

§ 1323. The rule is equally applicable, whatever be the purpose for which the instrument is produced (*z*), and, though originally framed in regard to deeds, is now extended to every species of attested writing (*a*). But, although the witness must in the first instance be called, yet, inasmuch as he is rather the witness of the Court than of the party, great latitude will be allowed in the mode of examining him, and, if it be necessary, the judge will even permit questions in the nature of a cross-examination to be put to him (*b*). Moreover, the party calling him is not precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed (*c*).

§ 1324. To this rule, requiring the production of the subscribing witnesses, there are several *classes of exceptions*. The *first* is when the *instrument is thirty years old*; in which case, as we have seen (*d*), it is said to prove itself, the subscribing witnesses being presumed to be dead, and other proof being presumed to be beyond the reach of the party. The *second exception* is when the attesting witness has not been selected by the party executing the

v. Brewer, 4 Taunt. 46, where Sir James Mansfield observes, that "perhaps in some instances of sickness," the handwriting of the attesting witness may be proved. See ante, § 352.

(*x*) 1 Will. 4, c. 22, § 4; ante, § 364.

(*y*) 3 Camp. 457.

(*z*) *Manners v. Postan*, 4 Esp. 239, where the deed was used in evidence collaterally; *R. v. Jones*, 1 Lea. C. C. 174, where upon an indictment against an apprentice for a fraudulent enlistment the indenture was put in.

(*a*) *Doe v. Durnford*, 2 M. & Sel. 62, which was a notice to quit; so of a warrant to distrain, *Higgs v. Dixon*, 2 Stark. R. 180; a receipt, *Wishart v. Downey*, 15 Serg. & R. 77; a promissory note, *Currie v. Brown*, 3 Camp. 283.

(*b*) *Bowman v. Bowman*, 2 M. & Rob. 501, per Cresswell, J., ante, §§ 1028, 1045.

(*c*) *Ley v. Ballard*, 3 Esp. 173, n.; *Fitzgerald v. Elsee*, 2 Camp. 635; *Lemon v. Dean*, id. 636, n.; *Talbot v. Hodson*, 7 Taunt. 251, overruling *Phipps v. Parker*, 1 Camp. 412.

(*d*) Ante, § 70.

instrument, but has *merely signed it in pursuance of a rule of Court*. Thus, where it was necessary for a defendant to prove that he had presented an insolvent's petition for protection under the stat. 5 & 6 Vict. c. 116, the production of the petition and the proceedings in the Court of Bankruptcy duly sealed, was held to be sufficient evidence of that fact, though an attorney, who had attested the petition by order of the Bankruptcy Court, was not called (e). A *third exception* is, when the instrument is proved to be in the *possession of the adverse party, who refuses to produce it pursuant to notice*. In this case the party, who is driven to give parol evidence of its contents, need not call the attesting witness, though the plea be non est factum, and though the name of the witness were mentioned in the notice, and he be actually in court (f).

§ 1325. A *fourth exception* is admitted, when the *adverse party producing a deed pursuant to notice, claims an interest under it in the cause*. In such case, the party producing the instrument is not permitted to call on the other for proof of the execution ; for, by claiming an interest under it, he admits its validity (g). Still, this rule only applies, when the party producing the deed claims under it *some interest in the subject-matter of the cause* (h) ; and, therefore, where, in an action brought for commission due to the plaintiff as agent in procuring for the defendant an apprentice, the deed of apprenticeship was produced under notice by the defendant, the plaintiff was held bound to call the attesting witness ; and he having been nonsuited for omitting to do so, the Court refused to grant him a new trial on the ground that he did not know, previously to the production of the deed, that there was an attesting witness, since

(e) *Bailey v. Bidwell*, 13 M. & W. 73.

(f) *Cooke v. Tanswell*, 8 Taunt. 450 ; *Poole v. Warren*, 8 A. & E. 588 ; 3 N. & P. 693, S. C.

(g) *Pearce v. Hooper*, 3 Taunt. 60 ; *Rearden v. Minter*, 5 M. & Gr. 204 ; *Carr v. Burdiss*, 1 C. M. & R. 784 ; *Orr v. Morice*, 3 B. & B. 139 ; 6 Moore, 347, S. C. ; *Bradshaw v. Bennett*, 1 M. & Rob. 143, per Lord Tenterden ; 5 C. & P. 48, S. C. ; *Doe v. Wainwright*, 5 A. & E. 520, 528 ; *Bell v. Chaytor*, 1 C. & Kir. 162 ; *Doe v. Hemming*, 9 D. & R. 15.

(h) *Doe v. Marq. of Cleveland*, 9 B. & C. 864, 869 ; *Curtis v. M'Sweeney*, Ir. Cir. R. 343.

it did not appear that he had made any inquiry on the subject (i). Where both parties claim the same interest under a deed produced on notice, the party calling for its production need not prove its execution (k); and the fact that the party producing the instrument claims an interest under it, will sufficiently appear by a statement to that effect, made by his attorney shortly before the trial (l). So, in America, where both parties claim under the same ancestor, the title-deeds, being equally presumable to be in the possession of either, may be proved by copies from the registry (m). It would seem, however, from a late case (n), that it is not every possible interest which will render a document admissible without proof, as against the party producing it; but that it must be either an interest of a permanent character, or at least one on which the party has acted. Thus, where a defendant, to prove himself a partner with the plaintiff, called upon him to produce a contract which they, as partners, had made with a builder, for work to be done on the plaintiff's premises; and, on its production, contended that the plaintiff claimed an interest under this instrument, inasmuch as it would enable him, if necessary, to control the builder's proceedings, or to enforce a specific performance against him, Lord Denman required proof of the execution, and the Court confirmed his ruling. This exception, also, does not extend to a case where a party, claiming an interest under a deed, gives it up to the adverse side some months (o), or perhaps any time (p), before the action; because, in such case, the party wishing to make it evidence has had the instrument in his own custody, and may therefore well be prepared to prove its execution.

§ 1326. We have seen (q) that the acknowledgment of a deed by a party to it does not, in general, waive the necessity of calling the attesting witness. Still, there are a few instances, in which a

(i) *Rearden v. Minter*, 5 M. & Gr. 204. See *Gordon v. Secretan*, 8 East, 548.

(k) *Knight v. Martin*, 1 Gow, R. 46, per Dallas, C. J.

(l) *Roe v. Wilkins*, 4 A. & E. 86; 5 Nev. & M. 434, S. C.

(m) *Burghardt v. Turner*, 12 Pick. 534.

(n) *Collins v. Bayntun*, 1 Q. B. 117.

(o) *Vacher v. Cocks*, 1 B. & Ad. 147, 148.

(p) *Carr v. Burdiss*, 1 C. M. & R. 785, per Parke, B.

(q) *Ante*, §§ 304, 1322.

solemn admission by the adverse party *in reference to the cause* has been held in itself sufficient proof of execution; and these cases constitute the *fifth exception* to the rule. Thus, where a party agreed to admit a warrant of attorney "so as to enable his opponent to enter up judgment thereon," the Court held that judgment might be entered up without an affidavit of the subscribing witness (*r*). So, in an action on covenant, if the defendant pay money into court on one of the breaches, this is such an admission of the validity of the deed, as to dispense with the production of the attesting witness, though *non est factum* be pleaded (*s*). In like manner, if a party or his attorney, in order to avoid expense, agree to admit the execution of an instrument which he is called upon by summons to admit, he cannot afterwards require that the attesting witness should be called (*t*). It seems also, from one or two cases, that, if a party solemnly recites a deed or will in an instrument under his *seal*, and moreover has *acquired* some *benefit* on the faith of the document recited being valid, he cannot compel his opponent, who relies on the recited document, to prove its validity by calling the attesting witness (*u*).

§ 1327. A *sixth* exception to this rule is recognised, where the party, from *physical or legal obstacles*, 'is unable to adduce the witness' (*v*). Thus, if the witness be proved to be dead (*x*); or to be insane (*y*); or to be out of the jurisdiction of the Court (*z*); or if he

(*r*) *Laing v. Kaine*, 2 B. & P. 85, per Lord Eldon and Heath, J., *Rooke, J.*, dubitante.

(*s*) *Randall v. Lynch*, 2 Camp. 357, per Lord Ellenborough.

(*t*) Reg. Gen. H. T. 4 Will. 4, r. 20; 5 B. & Ad. xvii.

(*u*) *Bringloe v. Goodson*, 5 Bing. N. C. 738; 8 Scott, 71, S. C.; *Nash v. Turner*, 1 Esp. 217, per Lord Kenyon. See *Fishmongers' Co. v. Robertson*, 1 M. & Gr. 67—71, and cases there cited.

(*v*) See ante, §§ 347, 1322.

(*x*) *Adams v. Kerr*, 1 B. & P. 360.

(*y*) *Currie v. Child*, 3 Camp. 283, per Lord Ellenborough; *Bennett v. Taylor*, 9 Ves. 381; see also 3 T. R. 712, per Buller, J.

(*z*) *Barnes v. Trompowsky*, 7 T. R. 265; even though not proved to be domiciled abroad, *Prince v. Blackburn*, 2 East, 250; notwithstanding the power to examine on interrogatories under 1 Will. 4, c. 22, § 4, *Glubb v. Edwards*, 2 M. & Rob. 300, per Maule, J.; though the witness be in Dublin, *Doe v. Caperton*, 9 C. & P. 115, and *Hodnett v. Forman*, 1 Stark. R. 90. See 26 Geo. 3, c. 57, § 38. If the witness has set out to leave the kingdom, but the ship has been beaten back, he is still considered absent. *Ward v. Wells*, 1 Taunt. 461. See also *Emery v. Twombly*, 5 Shepl. 65.

cannot be found after diligent inquiry (a); or if he have absented himself from the trial by collusion with the opposite party (b); it will be sufficient, but necessary, to prove his handwriting. If the instrument be lost, and the name of the subscribing witness be unknown (c); or if the supposed witness be proved to be a fictitious person, or even a real person, who has not signed the instrument himself, but whose name has been placed upon the deed by the party who made it (d); or if the witness be a mere volunteer, who, though actually present at the time of the execution of the deed, did not then sign it, but afterwards, when the whole matter was over, put his name to it as a witness, without being called upon to do so (e); or if the instrument were executed before the 22nd of August, 1843 (f), and the witness, at the time of attestation, were infamous (g); or if the witness have married, or become a partner with one of the parties in the cause (h) or be otherwise incapacitated, within the proviso contained in the Act of 6 & 7 Vict. c. 85 (i); in all these cases, the execution of the instrument must be proved by other evidence.

§ 1328. It is yet an undecided point whether a *seventh exception* will not be allowed in favour of *deeds executed by corporations*, and whether such an instrument will not be sufficiently proved by merely showing that the seal affixed is the seal of the corporation,

(a) *Cunliffe v. Sefton*, 2 East, 183; *Crosby v. Percy*, 1 Taunt. 364; *Earl of Falmouth v. Roberts*, 9 M. & W. 469; *Parker v. Hoskins*, 2 Taunt. 223; *Burt v. Walker*, 4 B. & A. 697. See post, § 1331.

(b) *Egan v. Larkin*, 1 Arm. Mac. & Ogle, 403, per Brady, C. B.; *Lord Clanmorris v. Mullen*, 1 Craw. & Dix, Abr. Cas. 8.

(c) *Keeling v. Ball*, Pea. Ev. App. xxxii.

(d) *Fassett v. Brown*, Pea. R. 33; *Cussons v. Skinner*, 11 M. & W. 161.

(e) *M'Craw v. Gentry*, 3 Camp. 232, per Lord Ellenborough; *Cussons v. Skinner*, 11 M. & W. 168, per Lord Abinger. It is not necessary that the witness should have seen the party actually sign the instrument; if the latter acknowledge his signature to the witness, and request him to attest it, that is sufficient. *Ledgard v. Thompson*, 11 M. & W. 41, per Parke, B.

(f) When the Act of 6 & 7 Vict. c. 85, was passed.

(g) 1 St. Ev. 375; in such case the attestation is treated as a nullity.

(h) *Buckley v. Smith*, 2 Esp. 697, per Lord Kenyon. Perhaps in this case proof of the handwriting of the witness would be sufficient. *Swire v. Bell*, 5 T. R. 372, and cases cited in n. (a) to that report. See also *Hovill v. Stephenson*, 5 Bing. 496, per Best, C. J.

(i) See this proviso, ante, § 952.

without calling the attesting witness (*k*). But be this as it may, the Court will not treat every signature of a stranger appearing upon a deed as an attestation. Thus, where a paper, to which the seal of the Bank of England was affixed, was wafered to an indenture, and contained these words: "Sealed by order of the Court of Directors, &c. J. K., Secretary," it was held that this was not an attestation by J. K., but a mere memorandum that the act was done by the order of the governor and company of the Bank (*l*).

§ 1329. An *eighth exception* has, in several old cases (*m*), been recognised in respect of *deeds*, the validity of which depends upon the fact of their being *enrolled* (*n*). No modern case has expressly decided this point, and though in practice it is still not unusual to admit such deeds on proof of enrolment, the principle of thus admitting them, except as against the party on whose acknowledgment they have been enrolled, has been questioned by

(*k*) *Moises v. Thornton*, 8 T. R. 307, per Lawrence, J.; *Doe v. Chambers*, 4 A. & E. 410; 6 N. & M. 539, S. C.

(*l*) *Doe v. Chambers*, 4 A. & E. 410; 6 N. & M. 539, S. C.

(*m*) Bro. Abr., *Faits enroll.* pl. 11, citing P. 7 E. 4, fol. 5, pl. 13, in which that point is distinctly laid down. See also *Lady Holcroft v. Smith*, 2 Freem. 259; 12 Vin. Abr. 43, 121; 5 Co. 54; 1 Keb. 117; *Thurle v. Madison*, Style, 462; *Smartle v. Williams*, 3 Lev. 387; 1 Salk. 280, S. C.

(*n*) The Acts which render enrolment *necessary*, are—1st, the 27 Hen. 8, c. 16 (extended to counties Palatine by 5 Eliz. c. 26), which requires the enrolment of bargains and sales of estates of freehold or of inheritance;—2nd, the Mortmain Act, 9 Geo. 2, c. 36, which enacts that all conveyances to charitable uses shall be void "unless by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor, and enrolled in His Majesty's High Court of Chancery within six calendar months next after the execution thereof;"—3rd, the 53 Geo. 3, c. 141 (amended by 3 Geo. 4, c. 92, and 7 Geo. 4, c. 75), which relates to the enrolment of memorials of grants of annuities;—4th, the Act for the Abolition of Fines and Recoveries, 3 & 4 Will. 4, c. 74, which provides that every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rent not less than five-sixths of a rack-rent, and every consent deed of a protector to the disposition of lands by a tenant in tail, shall be void unless enrolled. See §§ 41, 46, 49, 51, 52, 59;—5th, the 34 Geo. 3, c. 14, which provides that no clerk shall be admitted to be a solicitor or attorney in any of the courts of Westminster, unless his articles shall be enrolled; but indemnity Acts are occasionally passed to remedy the omission. See 1 Will. 4, c. 26, § 6. By 7 Will. 4 & 1 Vict. c. 30, the officer with whom the articles should be enrolled is one of the Masters;—6th, the Act of 1 & 2 Geo. 4, c. 92, which contains some special provisions for enrolling exchanges of lands that are subject to trusts for charitable purposes. The Acts which *permit*

Mr. Justice Buller (*o*). It is worthy of remark, that in the case of *Doe v. Lloyd*, which was tried twice, and turned upon the validity of a deed enrolled under the Mortmain Act, the execution of the indenture was proved on both trials (*p*).

§ 1330. Where there are several subscribing witnesses to an instrument, it is only necessary, at law, to call *one* of them (*q*) ; and the same rule prevails in Chancery (*r*), *excepting* in the case of *wills*, with respect to which it has for many years been the invariable practice of courts of equity to require that all the witnesses, who are in England, and capable of being called, should be examined (*s*). The reasons for this exception appear to be, that frauds are frequently practised upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir-at-law has a right to demand proof of this fact from every one of the witnesses whom the statute has placed about his ancestor (*t*). These will

enrolments to be made, are—1st, the 2 & 3 Anne, c. 4, which provides that a memorial of all deeds, conveyances, and wills concerning any houses, manors, lands, tenements, or hereditaments in the West Riding of Yorkshire, may, at the election of the parties concerned, be registered. This Act was amended by 5 Anne, c. 18 ; and its provisions were extended to the East Riding by 6 Anne, c. 35 ; to the North Riding by 8 Geo. 2, c. 6 ; and to Middlesex by 7 Anne, c. 20 ; this last Act is further amended as to the party entitled to act as register by 25 Geo. 2, c. 4 ;—2nd, the 3 & 4 Will. 4, c. 87, which, after reciting that by divers Acts of Inclosure the awards of the commissioners are required to be enrolled, but that such enrolments have been omitted, enacts that the awards not enrolled shall still be valid, but that parties may enrol them if they think proper. See further as to enrolments, ante, §§ 1191—1193.

(*o*) B. N. P. 255. “If divers persons seal a deed, and one of them acknowledge it, it may be enrolled, and may ever after be given in evidence as a deed enrolled ; but it would be of very mischievous consequence to say therefore, that a deed, enrolled upon the acknowledgment of a bare trustee, might be given in evidence against the real owner of the land without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by 10 Anne, c. 18.” See ante, § 307.

(*p*) 5 Bing. N. C. 742, and 1 M. & Gr. 683.

(*q*) *Holdfast v. Dowsing*, 2 Str. 1254 ; B. N. P. 264 ; *Hindson v. Kersey*, 4 Burn, Ecc. L., 118, per Lord Camden.

(*r*) *Gresley*, Ev. 120.

(*s*) *Grayson v. Wilkinson*, 2 Ves. 459 ; *Townsend v. Ives*, 1 Wils. 216 ; *Ogle v. Cook*, 1 Ves. 177.

(*t*) Per Lord Camden in *Hindson v. Kersey*, rep. in 4 Burn, Ecc. Law, 116, 119, 120, and cited *Gresley*, Ev. 123.

probably be deemed satisfactory reasons for the rule; but should the soundness of the reasons admit of any doubt, the inflexibility of the rule admits of none; and it applies in full force even to issues, which are directed by a court of equity to be tried by a jury (*u*). On such occasions, it is usual to say that all the subscribing witnesses must be called, in order to satisfy the conscience of the Lord Chancellor.

§ 1331. The *degree of diligence* required in seeking for the subscribing witnesses is the same as in the search for a lost paper (*x*), the principle being, in both cases, identical. The inquiry must be strict, diligent, and honest, and in all respects satisfactory to the Court, under all the circumstances of the case. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; as also, in general, of his relatives and others, who may be supposed capable of affording information respecting him. A reference to one or two decisions will serve to illustrate this subject. In the case of the Earl of Falmouth *v.* Roberts (*y*), the plaintiff relied upon an agreement, to which his steward was the attesting witness. This man, having been charged with embezzlement, had absconded, and could not be found, though inquiries were made for him at his house, and at the inns he was in the habit of frequenting. The Court held that this was sufficient search to let in evidence of his handwriting, although no application was shown to have been made to any member of his family. In another case, after proof that inquiry had been made at the residences of the parties to the instrument respecting the witness, and that no account could be obtained as to who he was, or where he lived, secondary evidence was admitted, though it was urged, that, in such a case, a public advertisement for him should have been inserted in the newspapers (*z*). Again, in *Burt v. Walker* (*a*), the defendant's clerk

(*u*) *Bowman v. Bowman*, 2 M. & Rob. 501.

(*x*) *Ante*, § 313.

(*y*) 9 M. & W. 469.

(*z*) *Cunliffe v. Sefton*, 2 East, 183.

(*a*) 4 B. & A. 697. For other instances, see *Wardell v. Fermor*, 2 Camp. 282; *Willman v. Worrall*, 8 C. & P. 380; *Wyatt v. Bateman*, 7 C. & P. 586; *Doe v. Powell*, *id.* 617; *Kay v. Brookman*, 3 C. & P. 555; *Morgan v. Morgan*, 9 Bing. 359; *ante*, § 1327, n. (*a*).

was the witness to his bond, and on being subpoenaed for the plaintiff, said that he would not attend. He, however, did attend, though apparently without any view of exhibiting himself as a witness; and the trial being put off, it was afterwards twice postponed on account of his absence, upon affidavits that he could not be found. Six weeks after the first postponement the cause was tried, when, it appearing that search had been made for the witness at the defendant's house and in the neighbourhood, as also at Margate, to which place the defendant stated that he had gone, evidence of his handwriting was held to be admissible. In all cases of this nature, the answers to the inquiries may be given in evidence, they being not hearsay, but parts of the *res gestæ* (b).

§ 1332. If there be *more than one attesting witness*, the *absence of them all* must be duly accounted for, in order to let in secondary evidence of the execution of the instrument (c); but when such secondary evidence is rendered admissible, proof of the handwriting of any *one* of the *witnesses* will, in general, be deemed sufficient to admit the instrument to be read, provided it be accompanied by some *evidence* of the *identity* of the party sued, with the person who appears to have executed the instrument (d). Proof of the signature of the obligor is an obvious mode of establishing this identity, but it is by no means the only mode; and with the view of ascertaining the nature and amount of evidence, which will be deemed sufficient for this purpose, a few late cases on the subject of identity will here be noticed.

§ 1333. In *Jones v. Jones* (e), which was an action by the indorsee against the maker of a note, the attesting witness stated that he saw a party, called Hugh Jones, who kept the Glasgow Tavern at Llangefni, in Anglesea, sign the note; but he added, on cross-examination, that he had not seen this person since, and that the name was a common one in Anglesea. The Court held

(b) Ante, § 350.

(c) *Cunliffe v. Sefton*, 2 East, 183; *Wright v. Doe d. Tatham*, 1 A. & E. 21, 22; *Whitelocke v. Musgrove*, 1 Cr. & Mee. 511; 3 Tyr. 541, S. C.

(d) *Adam v. Kerr*, 1 B. & P. 360; *Nelson v. Whittall*, 1 B. & A. 19; *Doe v. Paul*, 3 C. & P. 613.

(e) 9 M. & W. 75, 79.

that the plaintiff must be non-suited, though the defendant had in one of his pleas admitted the making of the note ; and Mr. Baron Parke observed, that the defendant's attorney should have been called, to say whether the person who employed him in the case was the Hugh Jones who lived at the Glasgow Tavern. The case of *Greenshields v. Crawford* (*f*) was a similar action against the acceptor of a bill, which was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford." A witness proved that this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but he did not know whether that Mr. Crawford was the defendant. The Court held that this was sufficient evidence of identity, at least in the absence of an affidavit to show that the defendant was not that person. It will be seen that the only sensible distinction between these two cases, which were decided by the same court within a few months of each other, was, that in the former, the name of Hugh Jones was said to be common, whereas that of Charles Banner Crawford was certainly unusual. In *Simpson v. Dismore* (*g*), where an apothecary brought his action for medicines and attendance, and in order to prove that he had been duly admitted to practice, produced a licence from the Apothecaries' Company, which was granted to a person bearing his name, the Court held that no further evidence was necessary to show that he was the party named in the licence. In *Russell v. William Gray Smyth* (*h*), where the question was, whether the defendant was proved to be the same person as the defender in a Scotch suit, the judges decided that there was ample evidence of identity, on the ground that the names, professions, places of abode, and ages of the parties appeared to be the same. So, in *Smith v. Henderson* (*i*), which was an action on the case for negligence in navigation, it was objected that the evidence did not show that the defendant was the pilot in charge of the vessel ; whereupon the plaintiff's counsel called out "Mr. Henderson," and a man in court answered "here ; I am the pilot." A witness then proved that this man, at the time of the accident, was acting as pilot. Baron Rolfe, thinking that this was not sufficient evidence

(*f*) 9 M. & W. 314.

(*h*) Id. 818, 819.

(*g*) Id. 47.

(*i*) Id. 798.

of identity, directed a non-suit, but the Court above set it aside. Baron Parke, during the argument, observed, "*similarity of name and residence, or similarity of name and trade, will do*;" and added in the judgment "The defendant is sued on the face of the *declaration* as William Henderson, a pilot. A man in court answers to the name of Henderson, is a pilot, and was proved to be the pilot acting on board the vessel. He therefore fulfils the description in the *declaration* in two respects at least, since his name and calling resemble those of the alleged defendant" (*k*).

§ 1334. It may, however, here be observed, that the description in the declaration cannot properly be said to prove the identity of the defendant. The question is, who was served with the writ, and who has pleaded to the action? and it is obvious that no description which the plaintiff chooses to introduce into his statement of his own case, can in strictness answer this question, or affect the defendant's interest. We make this remark, because in the case above-mentioned of *Greenshields v. Crawford*, the Court appear to have acted upon a similar mistake. The decision in *Smith v. Henderson* was right, not because the defendant was described by the plaintiff as a pilot, but because the accident was proved to have been caused by a pilot named Henderson, and a person answering that name and description was *present in court*, and might therefore be fairly presumed to be the same Mr. Henderson who had pleaded to the action. In another case, in which a witness, called to prove the defendant's handwriting, had corresponded with a person bearing his name, who dated his letters from Plymouth Dock, where the defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient (*l*); and in *Warren v. Sir J. C. Anderson, Bart.* (*m*), where the only proof of the defendant's signature to a bill was given by a clerk at Coutts's, who stated that, two years before the trial, he saw a person, whom he did not know, but who called himself Sir J. C. Anderson, Bart., sign his name,—that he had since seen cheques similarly signed pass through the banking

(*k*) 9 M. & W. 801.

(*l*) *Harrington v. Fry, Ry. & M.* 90, per Best, C. J.

(*m*) 8 Scott, 384.

house, and that he thought the handwriting was the same as that on the bill,—the Court held that the evidence, weak as it confessedly was, might be submitted for the consideration of the jury.

§ 1835. It only remains to notice two late decisions in the Court of Queen's Bench, which, if recognised by the other courts, will go far towards neutralising an objection, which has too often been permitted to shield the unprincipled. We refer to the cases of *Sewell v. Evans* and *Roden v. Ryde* (*n*). In the first of these the defendant's name was William Leal Evans; in the second, Henry Thomas Ryde; and in neither was any evidence adduced beyond the similarity of name, identifying the person whose signature was proved with the party upon whom process had been served. The Court held that no proof was necessary, observing, that if the party to be fixed with liability was a marksman, as in the case of *Whitelocke v. Musgrove* (*o*), or if his name was proved to be very common in the country, as in the case of *Jones v. Jones* (*p*), or if a length of time had elapsed since the name was signed, or if, in short, any other special facts were involved in the case, a stricter proof might be required; but that in ordinary cases, where no particular circumstance tended to raise a question as to the party being the same, *mere identity of name was something from which an inference might be drawn*. Lord Denman, after stating that the onus of proving a negative in these cases might be safely thrown upon the defendant, partly because the proof was easy, and partly because the supposition that a wrong man had been sued was unreasonable, inasmuch as the fraud would occur to few, and the risk of punishment in practising the fraud would be great, emphatically added, "The transactions of the world could not go on if such an objection were to prevail. It is unfortunate that the doubt should ever have been raised; and it is best that we should sweep it away as soon as we can" (*q*).

§ 1836. It has been held in America, that where the absence of the subscribing witnesses has been duly accounted for, the instru-

(*n*) 4 Q. B. 626; 3 G. & D. 604, S. C.

(*o*) 1 Cr. & Mee. 511; 3 Tyrwh. 541, S. C.

(*q*) 4 Q. B. 633.

(*p*) 9 M. & W. 75.

ment may be read upon proof of the handwriting of the obligor, or party by whom it was executed ; but it seems to be still undecided in that country, whether such proof will be admissible, without first showing an inability to prove the signatures of the witnesses (r).

§ 1337. (s) When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the *writer* himself, if he be a competent witness, or some person who *actually saw the paper or signature written*. When this ocular proof cannot be procured, as must often be the case, recourse may be had to the testimony of witnesses, who are *acquainted with the handwriting*. Such evidence, indeed, may in all cases be given in the first instance, since the law recognises no distinction between these several modes of proof ; but as it is clearly less satisfactory than direct testimony, any unnecessary reliance on it will raise a suspicion, that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

§ 1338. The *knowledge of a person's handwriting* may have been acquired in both or either of two ways (t). The *first is from having seen him write* ; and though the weight of the evidence, which depends upon knowledge so obtained, must of course vary in degree, according to the number of times that the party has been seen to write, the interval that has elapsed since the last time, the circumstances, whether of hurry or deliberation, under which he wrote, and the opportunities and motives which the witness had for observing the handwriting with attention (u) ; yet the evidence will be admissible, though the witness has not seen the party write for twenty years (v), or has seen him write but once, and then only his

(r) *Jackson v. Waldron*, 11 Wend. 178, 183, 196, 197 ; *Valentine v. Piper*, 22 Pick. 90.

(s) The substance of the following twenty pages has already appeared in the *Law Rev.* No. IV., pp. 285—304.

(t) See 3 Benth. *Jud. Ev.* 598, 599.

(u) *Doe v. Suckermore*, 5 A. & E. 730, per Patteson, J.

(v) *R. v. Horne Tooke*, 25 How. St. Tr. 71, 72 ; *Eagleton v. Kingston*, 8 Ves. 473, 474, per Lord Eldon.

surname (*x*). Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's *mark*, from having frequently seen it affixed by him on other documents (*y*). The proof in such cases may be very slight, but the jury will be allowed to weigh it. The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands (*z*). Still, the party calling the witness may interrogate him, if he think proper, as to the circumstances on which his belief is founded; though if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be rejected (*a*). Where a witness, called to establish a forgery, had become acquainted with the signature of the party, from having seen him sign his name after the commencement of the suit, for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon justly observing, that the party might, through design, have written differently from his common mode of signature (*b*).

§ 1339. The *second way* in which the knowledge of a person's handwriting may be acquired, is by the *witness having seen, in the ordinary course of business, documents, which by some evidence, direct or circumstantial, are proved to have been written by such person*. Thus, if the witness has received letters, purporting to be in the handwriting of the party, and has either personally commu-

(*x*) 5 A. & E. 730, per Patteson, J.; *Garrells v. Alexander*, 4 Esp. 37, per Lord Kenyon; *Willman v. Worrall*, 8 C. & P. 380; *Burr v. Harper*, Holt's N. P. R. 420; *Lewis v. Sapio*, M. & M. 39. In this last case, Lord Tenterden refused to recognise the authority of *Powell v. Ford*, 2 Stark. R. 164, where Lord Ellenborough rejected the testimony of a witness, who had seen the defendant write his surname only once, the acceptance of the bill in question having been signed at full length. See also *Warren v. Anderson*, 8 Scott, 384.

(*y*) *George v. Surrey*, M. & M. 516, per Tindal, C. J., after some hesitation.

(*z*) *Moody v. Rowell*, 17 Pick. 419, overruling *Slaymaker v. Wilson*, 1 Pennsylv. R. 216.

(*a*) *R. v. Murphy*, 8 C. & P. 306, 307, per Coleridge J.; *Da Costa v. Pym*, Pea. Add. R. 144, per Lord Kenyon.

(*b*) *Stanger v. Searle*, 1 Esp. 15. See also *Page v. Homans*, 2 Shepl. 478.

nicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the party, as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible (c). So, if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is that the answer was written by the person addressed in the letter; and, consequently, the witness who received such answer, may be examined as to the genuineness of any other paper, which it is necessary to show was or was not written by the same person (d). Again, the clerk who constantly read the letters, or the broker, who was consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him (e). In one case, an attorney was permitted to speak to the signature of an attesting witness, though his knowledge of the handwriting was solely derived from having seen the same signature attached to an affidavit, which had been filed by the opposite party in a previous stage of the cause (f). Here the opposite party, having used the affidavit as a genuine document, was in a manner estopped from disputing the fact that it was signed by the person whose signature it bore; but perhaps, after all, some doubt may be entertained respecting the correctness of this decision; since, in another case, the plaintiff's attorney was not allowed to prove the defendant's handwriting, though he had frequently seen and acted upon other papers in the Master's office, which the opposite attorney admitted had been written by the defendant (g).

(c) *Doe v. Suckermore*, 5 A. & E. 731, per Patteson, J.; 2 Nev. & P. 46, S. C.; *Lord Ferrers v. Shirley*, Fitzg. 195; B. N. P. 236; *Carey v. Pitt*, Pea. Add. Cas. 130; *Tharpe v. Gisburne*, 2 C. & P. 21; *Harrington v. Fry*, Ry. & M. 90; *Burr v. Harper*, Holt's N. P. R. 420; *Com. v. Carey*, 2 Pick. 47; *Johnson v. Daverne*, 19 Johns. 134; *Pope v. Askew*, 1 Iredell R. 16.

(d) *Carey v. Pitt*, Pea. Add. Cas. 130, per Lord Kenyon.

(e) *Doe v. Suckermore*, 5 A. & E. 740, per Lord Denman.

(f) *Smith v. Sainsbury*, 5 C. & P. 196, per Park, J., cited by Lord Denman in *Doe v. Suckermore*, 5 A. & E. 740.

(g) *Greaves v. Hunter*, 2 C. & P. 477, per Abbott, C. J.

§ 1340. Where, in an action on a joint and several promissory note against three persons, the signature of one of them was attempted to be proved by calling the attorney for the defendants, whose knowledge of his handwriting was founded on the circumstance, that he had required a retainer signed by his three clients, and had in fact received one purporting to be so signed, and had acted upon it in defending the action, the Court of Common Pleas held that his testimony was inadmissible, inasmuch as there was no proof that the party had ever acknowledged the signature to the attorney, and either of the other two defendants might have signed the retainer for him with his assent (*h*). So, the testimony of an inspector of franks, called to prove the handwriting of a member of Parliament, has more than once been rejected, where the knowledge of the witness has been simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he has never communicated with the member on the subject of the franks ; for, in this case, there is no evidence to prove that the superscriptions of the letters he had seen were not forgeries (*i*). These last decisions certainly carry the law to the verge of impropriety, since they are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sound rule, that a crime is not to be presumed, or so much as suspected, without special ground, in any single instance ; much less in a number of unconnected instances (*k*).

§ 1341. In whichever of these two ways the witness has acquired his knowledge of handwriting, it is obvious that evidence, identifying the person whose writing is in dispute with the person whose hand is known to the witness, must be adduced, either aliundè, or by the testimony of the witness himself, if he be personally acquainted with the writer (*l*). If this were not so, the witness might be proving the handwriting of one man, while the

(*h*) *Drew v. Prior*, 5 M. & Gr. 264.

(*i*) *Carey v. Pitt*, Pea. Add. Cas. 130, per Lord Kenyon ; *Batchelor v. Honeywood*, 2 Esp. 714, per id.

(*k*) 3 Benth. Jud. Ev. 604.

(*l*) See *Doe v. Suckermore*, 5 A. & E. 731, per Patteson, J.

party calling him might be seeking to establish the signature of another.

§ 1342. When witnesses are called to speak to handwriting, they should declare their *belief* on the subject, though in one case it has been held by Lord Kenyon, that the evidence of a witness, who, acknowledging his inability to form a belief, merely stated that the paper produced was *like* the handwriting of the individual by whom it purported to have been written, was admissible (*m*). This case, though recognised by Lord Wynford (*n*), has been questioned by Lord Eldon (*o*), and apparently with reason. It may be very true, as Lord Eldon admits, that witnesses are occasionally pressed too much to form a belief (*p*); and some allowance should certainly be made for the over caution of a scrupulous witness; but though it may be very proper to receive the testimony of a person, who, declining to express a decided belief, will yet declare that he is of *opinion*, or that he *thinks*, the paper is genuine, yet it is going a step further when the witness will only state that the handwriting is like; a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

§ 1343. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is, in its nature, comparison;—it being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge (*q*);—yet the law will not allow the witness, or even the jury, except under circumstances that will be presently mentioned (*r*), actually to *compare two writings* with each other, in order to ascertain whether both were written by the same person. Several reasons have been assigned for this rule. One is that the jury may be

(*m*) *Garrells v. Alexander*, 4 Esp. 37.

(*n*) 2 Ph. Ev. 249, n. (2).

(*o*) *Eagleton v. Kingston*, 8 Ves. 476. See also *Cruise v. Clancy*, 6 Ir. Eq. R. 552.

(*p*) *Eagleton v. Kingston*, 8 Ves. 476.

(*q*) *Doe v. Suckermore*, 5 A. & E. 731, per Patteson, J.

(*r*) *Post*, §§ 1350—1359.

too illiterate to form an opinion upon this sort of evidence. "Suppose," said Mr. Justice Yates, "some of the jury cannot read; how can they judge of the similitude?" (r) Surely this argument requires no answer at the present day, and never could have applied to the case of a witness being called upon to make the comparison; since a party would scarcely select for this duty a person, whose ignorance, instead of throwing light, would heap ridicule, on his cause (s). A second reason is, that specimens may be craftily selected, being such as are calculated rather to serve the purpose of the party producing them, than to exhibit a fair example of the general character of the handwriting (t); but to this it may be answered, first, that, if the specimens were authentic autographs, they would at least furnish *some*, though not the most satisfactory, data, by which a comparison might be formed with the writing in dispute, since a certain similarity may be ever traced between the most dissimilar writings of the same person (u); and, secondly, that the unfairness of the selection would be open to inquiry, and if exposed, as it might easily be on cross-examination, would draw down on the party making the attempt the usual consequences of detected fraud (x).

§ 1344. If the *genuineness* of the specimens be disputed, another and more serious objection to the mode of proof by comparison arises; for in such an event, collateral issues might be raised upon every paper used as a standard; and it is further urged, that, as these papers might be also proved by mere comparison, the inquiry might lead to an endless series of issues, each more unsatisfactory than the preceding (y). The last branch of this argument is evidently founded on fallacy; since it is obvious that one specimen at least *must* be proved in some other way than by comparison;

(r) *Brookbard v. Woodley*, Pea. R. 21, n. (a); *Macferson v. Thoytes*, id. 20, per Lord Kenyon; *Eagleton v. Kingston*, 8 Ves. 475, per Lord Eldon; *Burr v. Harper*, Holt, N. P. R. 421, per Dallas, J.; *Doe v. Suckermore*, 5 A. & E. 723, per Williams, J., and 749, per Lord Denman.

(s) See per Lord Denman, in *Doe v. Suckermore*, 5 A. & E. 749.

(t) *Burr v. Harper*, Holt, N. P. R. 421, per Dallas, J.

(u) See per Williams, J., in *Doe v. Suckermore*, 5 A. & E. 726.

(x) See per Lord Denman, in *Doe v. Suckermore*, 5 A. & E. 751.

(y) *Doe v. Suckermore*, 5 A. & E. 706, 707, per Coleridge, J.; 2 St. Ev. 516.

and such being the case, no man in his senses would run the risk of complicating, if not defeating, his proof, by tendering papers to be compared with this autograph, in order that such papers might in their turn form a standard, wherewith to compare the disputed document. Prudence, to say nothing of justice, would surely suggest the wisdom of producing the autograph alone. Indeed the whole argument is much more specious than sound, as it would never be necessary, and seldom expedient, to prove more than one disputed specimen, and there could be no more danger or difficulty in allowing the judge to decide whether this proof had been satisfactorily established, than is now felt in those cases, where the Court has to pronounce an opinion on the admissibility of confessions or dying declarations, or has to determine, whether a deed has been duly executed or stamped, or whether sufficient search has been made for it, or whether it comes out of the proper custody. In all these and the like cases, the judge, as we have before seen, is called upon to decide questions of fact (z).

§ 1345. It may be here worth while to cite the remarks of Sir W. D. Evans, who is certainly no mean authority on this, or any other legal question. "Where, in point of reason," says that profound writer, "is the objection to proof by comparison of hands, as founded upon an inspection at the trial?" . . . "What is the common evidence of knowledge but an act of comparison; a comparison of the object presented to the sight, with the object imprinted by memory in the mind, with the image and copy of the supposed reality? And when the comparison is made, not with this imperfect and fallacious copy, but with an undisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may be naturally expected to afford" (a). Even Mr. Starkie, who appears, on the whole, to be in favour of the rule as it exists, is forced to admit, "that abstractedly a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and

(z) Ante, § 21.

(a) 2 Evans's Poth. Law of Obl. 185, App. No. 16, § 6.

genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then perhaps under circumstances which did not awaken his attention" (b).

§ 1346. It has been urged that this is an unfair mode of stating the argument, since the weakest possible degree of knowledge which can arise from seeing a person write, is contrasted with the strongest possible degree which can arise from a direct comparison (c); but, admitting this to be the case, we are prepared to go much further than Mr. Starkie, and to contend that in almost every case, a jury would be more likely to come to a correct conclusion, were they allowed to compare, in their own way, the paper in dispute, with a proved or acknowledged autograph (d), than they now are, when called upon to pronounce a verdict on the evidence of a witness, who of course comes prepared to give favourable testimony on behalf of the party who calls him, who runs little risk of incurring the penalties of perjury, since he is only required to state his *belief*, and who, moreover, has seldom had an opportunity of acquiring any great familiarity with the character of the handwriting, on which he undertakes to pass an opinion. To illustrate the argument by referring to "twins, who may present no observable diversity to a *stranger*, and yet be distinguished at a glance by their *parents*" (e), is to advance a proposition at least as unfair as that stated by Mr. Starkie; for it assumes that all witnesses have acquired a most intimate knowledge of the handwriting which they are called upon to prove. Yet does the law demand the production of such witnesses, or are they in fact produced? Most assuredly not. Besides, the argument at best amounts to this, that persons well acquainted with the character of handwriting, are more competent than utter strangers to judge whether a document bears that character; a

(b) 2 St. Ev. 516.

(c) *Doe v. Suckermore*, 5 A. & E. 734, 735, per Patteson, J.

(d) In order to prevent the opposite party from being taken by surprise, a provision might be made, that papers should not be laid before the jury for the purpose of comparison, unless such papers had, previously to the trial, been submitted to the inspection of the adversary, and notice had been given of the course about to be pursued.

(e) *Doe v. Suckermore*, 5 A. & E. 745, per Lord Denman.

proposition, which, however true, does not touch the question, whether it be more expedient to have recourse to indirect, than to direct, comparison.

§ 1347. The fact, if it be one, that persons are apt to form fanciful conclusions from comparison of handwriting, some dwelling on the general character, some on the peculiar turn of a particular letter, and others on more minute circumstances of similitude or discrepancy, which may be wholly accidental, has been strangely twisted by one learned judge into an argument in favour of the present rule (*f*): but no fallacy can be more apparent than this: for, admitting that the fact is so, the only deductions derivable from it are,—first, that the power of proving handwriting by comparison cannot be safely entrusted to a *witness*, or even to a single judge,—secondly, that a jury should not be enabled to institute such a comparison for the purpose of *disproving* handwriting,—and lastly, that it may be impolitic for a party to rely on this mode of proof, in consequence of the difficulty of securing the suffrages of twelve men on a subject, respecting which opinions confessedly differ so largely.

§ 1348. The principle of direct comparison, which we here advocate, has been long recognised and acted upon by the common-law courts with respect to other matters. Thus, if a prisoner be charged with stealing wheat, and the question turn on the identity of that found in his possession with the corn belonging to the prosecutor, it is every day's practice to produce parcels from each lot, and to call upon the jury to compare them together, with or without the aid of witnesses; and no one dreams of contending that such a comparison is not more satisfactory, than if the farmer, who grew the wheat, and is therefore well acquainted with its character, were asked to speak to the identity of the lot found on the prisoner, by vaguely comparing it with the exemplar of his own corn, which memory had formed in his mind. Then, if this be the case,—and that it is so with respect to numerous questions of identity, has been shown in a previous part of this work (*g*),—why

(*f*) *Doe v. Suckermore*, 5 A. & E. 735, per Patteson, J.

(*g*) Ante, § 378, et seq.

is not the same principle to prevail, where the issue turns on the genuineness of handwriting? The same collateral issues may arise in all these cases; but while danger is *apprehended* from this cause in matters of handwriting, none whatever is *experienced* in all other inquiries of a kindred nature. The analogy, on principle, is complete; and no satisfactory reason can be given, why the practice should be different.

§ 1349. In the Ecclesiastical Courts, witnesses skilled in the examination of handwriting and detection of forgeries, have been permitted for centuries to depose to their opinion, upon direct comparison of the writing in question with other documents, admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; and that, too, though the specimens on which the comparison is founded may be wholly irrelevant to the case (*h*). In France the same doctrine prevails, at least to a limited extent (*i*); and in America, though some of the States have adopted the English rule, others have altogether rejected it, while a few have received it, subject to considerable modifications (*k*). It will be seen, by referring to the last note,

(*h*) 1 Will. on Ex. 260; 1 Oughton, Ord. Jud. tit. 225, §§ 1—4; Doe v. Suckermore, 5 A. & E. 708—710, per Coleridge, J.; Beaumont v. Perkins, 1 Phillim. 78; Saph v. Atkinson, 1 Add. Ecc. R. 215, 216; Machin v. Grindon, 2 Cas. temp. Lee. 335; 2 Add. Ecc. R. 91, n. (*a*), S. C.

(*i*) Code de Proc. Civ., part 1, liv. 2, tit. 10, §§ 193—213; Pothier, 3 Œuvr. Posth. 46; Doe v. Suckermore, 5 A. & E. 710, 711, per Coleridge, J.

(*k*) In New York, Virginia, and North Carolina, the English rule is adopted, and such testimony is rejected. Jackson v. Phillips, 9 Cowen, 94, 112; Titford v. Knott, 2 Johns. Cas. 210; Rowt v. Kile, 1 Leigh, R. 216; The State v. Allen, 1 Hawks, 6; Pope v. Askew, 1 Iredell, R. 18. In Massachusetts, Maine, and Connecticut, it seems to have become the settled practice to admit any papers to the jury, whether relevant to the issue or not, for the purpose of comparison of the handwriting. Homer v. Wallis, 11 Mass. 309; Moody v. Rowell, 17 Pick. 490; Richardson v. Newcomb, 21 Pick. 315; Hammond's case, 2 Greenl. 33; Lyon v. Lyman, 9 Conn. 55. In New Hampshire and South Carolina, the admissibility of such papers has been limited to cases, where other proof of handwriting is already in the cause, and for the purpose of turning the scale, in doubtful cases. Myers v. Toscan, 3 N. Hamp. 47; The State v. Carr, 5 N. Hamp. 367; Bowman v. Plunkett, 3 McC. 518; Duncan v. Beard, 2 Nott & McC. 401. In Pennsylvania, the admission has been limited to papers conceded to be genuine. McCorkle v. Binns, 5 Binn. 340; Lancaster v. Whitehill, 10 Serg. & R. 110; or, concerning which there is no doubt, Baker v. Haines, 6 Whart. 284.

that the American decisions do not add much weight to either side of the argument; and they are here noticed, rather as furnishing to the curious reader ample sources for further investigation, than as affording a safe, or indeed an intelligible, guide, on which to rely. Still, if it were possible to extract from those conflicting judgments any rule, which would find support from the majority of them, perhaps it would amount to this; that such papers can be offered in evidence to the jury, only when no collateral issue can be raised concerning them; that is, where the papers are either conceded to be genuine, or are such as the other party is precluded from denying; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony (*l*).

§ 1350. In thus discussing at length the general rule of law, which rejects all proof of handwriting by direct comparison, and in venturing to question the validity of the principles on which this rule is founded, it is not intended for a moment to deny the existence of the rule, but simply to advocate, however feebly, the adoption of another system; and, acknowledging the rule to be the law of the land to the fullest extent, it now becomes necessary to advert to *two exceptions*, which have been recognised in courts of justice with more or less distinctness. *First*, where *other documents, admitted to be genuine, have already been produced as evidence in the cause, the jury may compare them with the writing in dispute*. The reason assigned for this exception is, that, as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice or direction of the Court, to examine them for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause (*m*). In fact, it is impossible to prevent the comparison, and therefore the exception may be said

(*l*) *Smith v. Fenner*, 1 Gall. 170, 175. See also *Goldsmith v. Bane*, 3 Halst. 87; *Bank of Pennsylvania v. Haldemand*, 1 Pennsylv. R. 161; *Sharp v. Sharp*, 2 Leigh. 249; *Finch v. Gridley*, 25 Wend. 469.

(*m*) 20 Law Mag. 323, 324; *Griffith v. Williams*, 1 C. & Jer. 47; *Solita v. Yarrow*, 1 M. & Rob. 133, per Lord Tenterden; *Bromage v. Rice*, 7 C. & P. 548, per Littledale and Patteson, Js. *Hammond's case*, 2 Greenl. 33.

to rest on necessity (*n*). Moreover, this course is supposed to be the less inconvenient, inasmuch as documents, which are put in for other purposes, will generally be free from all suspicion of having been unfairly selected (*o*). But this last reason will not be universally applicable, because, if a paper happen to be admissible in its own nature, as bearing in however slight a degree on the cause, the judge cannot reject it, though it be avowedly put in for the sole purpose of enabling the jury to compare it with another document in dispute (*p*). Where the holder of a bill, which has been indorsed to him by the drawer, brings an action against the acceptor, who by his plea denies the indorsement alone, the jury cannot compare the indorsement with the drawing, and thus find a verdict for the plaintiff without the intervention of a witness, though the acceptance admits the drawing to be correct, and this is further confirmed by a subsequent acknowledgment by the defendant (*q*).

§ 1351. *Secondly*, where *documents* are of such *antiquity* that witnesses who have corresponded with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases (*r*). We have seen that, as a general rule, such documents, when thirty years old, prove themselves (*s*); but nevertheless there are occasions, when in order to establish identity, it becomes necessary to prove the handwriting. For instance, if in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, or if it be required to show the identity of the writer of two ancient documents, only one of which is admissible in the cause, the handwriting must be proved in some legal

(*n*) *Doe v. Newton*, 5 A. & E. 514; 1 N. & P. 1, S. C.; *Eaton v. Jervis*, 8 C. & P. 273, per Gurney, B. For another application of the same principle, see the judgment of Coleridge, J., in *Wright v. Doe d. Tatham*, 4 Bing. N. C. 500.

(*o*) *R. v. Morgan*, 1 M. & Rob. 135, n., per Bolland, B.

(*p*) *Waddington v. Cousins*, 7 C. & P. 595, per Lord Denman.

(*q*) *Allport v. Meek*, 4 C. & P. 267, per Tindal, C. J.

(*r*) *Doe v. Suckermore*, 5 A. & E. 717, 718, per Coleridge, J.; 724, 725, per Williams, J.; 736, per Patteson, J.; 747, 748, per Lord Denman.

(*s*) Ante, §§ 70, 71.

mode, however ancient the papers may be (*t*). The question then remains, how is this to be done? Till within a recent date it has been thought that the proof might be established in one or both of two ways;—either by producing other documents, admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and then permitting witnesses, whether experts or others, and perhaps even the jury, to compare such documents directly with the paper in dispute (*u*); or by calling witnesses, who, from a prior examination of these documents, could, without an actual comparison, pronounce their belief, as to whether or not the instrument in question were written by the same hand (*x*). But though, in the case of *Doe v. Suckermore*, the judges of the Court of Queen's Bench, differing as they did with respect to the immediate question before them, appear to have recognised the legality, if not of both these modes of proof, at least of the latter (*y*); yet the House of Lords, by a very recent decision, have thrown much doubt on the subject, if they have not expressly overruled the practice that had hitherto prevailed.

§ 1352. The question arose on the claim of Sir B. W. Bridges to the Barony of Fitzwalter (*z*), when it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years ago by an ancestor of the claimant, was in fact written by him. To establish this fact, an inspector of official correspondence was called, who stated that he had examined the signatures attached to two or three documents, which were admitted to have been executed by the ancestor;—

(*t*) *Tracy Peerage*, 10 Cl. & Fin. 154; *Fitzwalter Peerage*, id. 193; *Morewood v. Wood*, 14 East, 328; *Taylor v. Cook*, 8 Price, 652.

(*u*) *Davies v. Lowndes*, 7 Scott, N. R. 168, 169, 209; *Doe v. Tarver*, Ry. & M. 143, per Abbott, C. J.; *Anon.*, cited id., per Lawrence, J.; *Roe v. Rawlings*, 7 East, 282, n., per Le Blanc, J., on two occasions; *Morewood v. Wood*, 14 East, 328, per Hotham, B.; 20 Law Mag. 323, 324; *Taylor v. Cook*, 8 Price, 652, 653, per Richards, C. B.

(*x*) *Sparrow v. Farrant*, 2 St. Ev. n. (*e*), per Holroyd, J.; *Doe v. Lyne*, 1 Ph. Ev. n. (1), per id.; *Beer v. Ward*, cited id., per Dallas, C. J.; *Anon.*, per Lord Hardwicke, cited B. N. P. 236 b.

(*y*) Ante, note (*r*).

(*z*) *Fitzwalter Peerage*, 10 Cl. & Fin. 193.

that they were written in a remarkable character; and that his mind was so impressed with that character, as to enable him, without immediate comparison, to say whether any other document was or was not in the handwriting of the same person. The Attorney-General having objected to the testimony of this witness, on the ground that he had gained his knowledge of the handwriting, *not from a course of business*, like a party's solicitor or steward, but from *studying* the signatures for the *express purpose* of speaking to the identity of the writer, the Lord Chancellor and Lord Brougham were clearly of opinion that the testimony was inadmissible, the latter noble lord observing, that the cases of *Doe v. Tarver*, and *Sparrow v. Farrant* (*a*), if correctly reported, had gone further than the rule was ever carried; that the Lord Chief Justice entertained the same views on this last subject; and that if, as was doubtless the case, such kind of evidence had been often received, it was only because no objection had been raised. The family solicitor of the claimant was then called, and having stated that he had acquired a knowledge of the ancestor's handwriting, from having had occasion, at different times, to examine, in *the course of his business*, many deeds and other instruments purporting to have been written or signed by him, the lords considered this witness competent to prove the handwriting of the pedigree. The distinction drawn between these two witnesses is obvious. The former had studied the signatures admitted to be genuine, with the avowed purpose of discovering a similitude between them and the writing in dispute, and might well be supposed to bring to the investigation that bias in favour of the party calling him, which is proverbially displayed by scientific witnesses (*b*); the latter had acquired his knowledge incidentally, and unintentionally, under no circumstances of prejudice or suspicion, and, what is especially worthy of remark, without reference to any particular object, person, or document.

§ 1353. Again, in another recent case (*c*), where, in order to prove a pedigree, it became necessary to rely upon a marriage certificate, which purported to have been written and signed eighty-five years

(*a*) Ante, § 1351, notes (*u*) and (*x*).

(*b*) Tracy Peerage, 10 Cl. & Fin. 191, per Lord Campbell; ante, § 46.

(*c*) *Doe v. Suckermore*, 5 A. & E. 731, 735, per Patteson, J.

before the trial, by W. Davies, the then curate of the parish, the Court held that the document was admissible, on proof by the parish clerk, that in the course of his official duty he had acquired a knowledge of the handwriting of Mr. Davies from various signatures in the original register. It was objected that some witness should have been called to speak to the death of the curate, or to have shown when he died, or at least that some search should have been made for persons who might have seen him write, or have been able to prove his signature in the ordinary way; but the objections were overruled as untenable (*d*). Coupling these decisions with the case of *Brookbard v. Woodley* (*e*), in which Mr. Justice Yates refused to permit the proof of an old paper by comparison, it may perhaps be stated as the better opinion, that, although in proving *ancient* writings, no evidence of an ineffectual search for persons who have corresponded with the writer need be given, yet, in strict law, the handwriting of such documents must be proved by some witness who has become acquainted with it in the ordinary course of his business, and that it will not be allowable, either to call a scientific witness who has obtained his knowledge by studying other documents in the same handwriting, or to produce such documents to the jury, provided they be not admissible for some other purpose, in order to enable them to form a comparison.

§ 1354. But, be this as it may, the case of the Fitzwalter Peerage furnishes a strong *à fortiori* argument in favour of the rejection of a skilled witness, who is called to prove or disprove the signature of a *modern* instrument, and whose sole knowledge of the handwriting has been derived from the study of other papers, which are proved or admitted to have been written by the party, whose signature forms the matter in dispute. It may therefore be safely affirmed that the arguments of Mr. Justice Coleridge and Mr. Justice Patteson, who, in *Doe v. Suckermore*, would have rejected such testimony, are consistent with sound law as at present understood (*f*).

(*d*) *Doe v. Davies*, 16 L. J. (N. S.) Q. B. 218.

(*e*) *Pea. R.* 21.

(*f*) 5 A. & E. 703; 2 Nev. & P. 16, S. C. In this case a defendant in ejectment produced a will, and on one day of the trial (which lasted several days—called an attesting witness, who swore that the attestation was his. On his (cross

§ 1355. Whether a witness who has in his possession a paper which he has seen the party write, or which he has received from the party in the course of correspondence, can recur to it at the trial for the purpose of refreshing his memory, is a question which admits of much doubt. Such a course was permitted on one occasion by Mr. Justice Dallas (*g*); but the correctness of this ruling, though apparently recognised by one learned judge, has been expressly questioned by another (*h*); and as the leaning of the courts for some years past has been rather to limit than to enlarge the rule respecting proof of handwriting, it is presumed that this practice would not now be allowed. It is true that in such a case there is little danger of an unfair selection of specimens, and therefore, so far as that danger constitutes the ground for rejecting comparison, it does not apply; but the practice is still open to the objection, that it enables the witness to speak to his belief, not from the *revived* impression on his mind, but from a *new* impression made during the progress of the cause, in a manner that the law does not sanction.

§ 1356. Though scientific witnesses cannot, as it seems (*i*), prove ancient or modern documents, either by actual comparison, or by studying other papers for the purpose of qualifying themselves to give evidence respecting the document in dispute, it appears that their testimony will be admissible in *two cases*. First, if the writing be *ancient*, they may state their belief as to the probable *period* at which it was written, because, as the character of handwriting varies according to the progress of

examination, eighteen other signatures were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. The witness was an inspector at the Bank of England, who had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard in court. Per Lord Denman, C. J., and Williams, J., such evidence was receivable; per Patteson and Coleridge, Js., it was not.

(*g*) *Burr v. Harper*, Holt, N. P. R. 420.

(*h*) In *Doe v. Suckermore*, 5 A. & E. 724, Williams, J., cited *Burr v. Harper* as sound law, but Patteson, J., denied that the decision was right, p. 737.

(*i*) Ante, §§ 1351—1354.

civilisation, antiquarian knowledge may afford much assistance in arriving at a right conclusion (*j*). Secondly, if the question be whether a paper is written in a *feigned* or natural hand, witnesses whose duty it has been to detect forgeries will perhaps be admissible in this country, as they certainly are in America (*k*), on the ground, that such persons are supposed to be more capable than ordinary men of pronouncing a safe opinion on a subject of this nature (*l*). Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little if any weight will be attached to their evidence (*m*), and the Courts will jealously take care that their answers are confined within the strict bounds of the exception. Thus, on the trial of an information for a libel, a Post-office clerk, though permitted to state his belief that the libel was in a feigned hand, was not allowed to examine a letter written by the defendant, and then to give his opinion as to whether the same hand wrote both papers (*n*). This was clearly an act of comparison; and the fact, if it was one, that the handwriting of the libel was in a disguised character, was not considered a sufficient reason for varying the general rule.

§ 1357. There is one remaining point connected with this subject, on which doubts are still entertained; we allude to the

(*j*) *Doe v. Suckermore*, 5 A. & E. 718, per Coleridge, J.; *Tracy Peerage*, 10 Cl. & Fin. 154.

(*k*) *Hammond's case*, 2 Greenl. 33; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Carey*, 2 Pick. 47; *Lyon v. Lyman*, 9 Conn. 55; *Hubly v. Vanhorne*, 7 Serg. & R. 185; *Lodge v. Phipper*, 11 Serg. & R. 333. In America, the skilled witness may compare the writing in a feigned hand with other writings already in evidence in the cause. See cases above.

(*l*) *R. v. Cator*, 4 Esp. 117, 145, per Hotham, B.; *Goodtitle v. Braham*, 4 T. R. 497; *Doe v. Suckermore*, 2 Nev. & P. 18; *Fitzwalter Peerage*, 10 Cl. & Fin. 198, per Lord Brougham. See *Gurney v. Langlands*, 5 B. & A. 330, where, Wood, B., having rejected such evidence, the Court refused a new trial, and *Carey v. Pitt*, Pea. Add. R. 130, where Lord Kenyon acted in the same manner as Wood, B. See also the observations of Lord Denman in *Doe v. Suckermore*, 5 A. & E. 751.

(*m*) *Tracy Peerage*, 10 Cl. & Fin. 191, per Lord Campbell; *Gurney v. Langlands*, 5 B. & A. 330.

(*n*) *R. v. Cator*, 4 Esp. 117, 145, 146, per Hotham, B. Those who feel an interest in tracing a similarity between feigned and natural handwriting, are referred to the 4th vol. of Lord Chatham's *Corresp.*, where, at p. 37 of the fac-similes of autographs, they will find a curious comparison of the upright writing of Junius with the running-hand of Sir Philip Francis.

question how far the knowledge of a witness, who is called to prove handwriting, may be tested by showing him other documents, not admissible as evidence in the cause, and then asking him whether they are written by the same hand as the paper in dispute. Mr. Baron Parke, some years back, not only permitted this course to be adopted, but allowed all the papers to be shown to the jury, in order that they might see the degree of credit to which the witness was entitled (*o*); but in *Griffits v. Ivory* (*p*), where, several witnesses being called to establish a signature, the opposite party proposed to ask each of them whether another irrelevant paper was written by the same person, purposing to test their knowledge by the agreement or disagreement of their testimony on this point, the Court of Queen's Bench decided that the question could not be put; and Lord Denman added, that it was immaterial whether it could or could not be proved that the paper used as a test was written by the party whose signature was disputed.

§ 1358. This decision has been since acted upon by Mr. Baron Parke in one case at Nisi Prius (*q*); but in another very recent case, Mr. Justice Williams, after consulting the judges of the Common Pleas, decided in a directly opposite manner (*r*), and the Court of Exchequer has also questioned the soundness of the rule as laid down in the Court of Queen's Bench (*s*). The question thus arose. A witness, being called to disprove an acceptance which was signed "Robert Honner," gave as a reason for denying the genuineness of the signature, that the acceptor always signed his name "R. W. Honner." The opposite counsel, in cross-examination, put into his hand another irrelevant document, which was signed in the same manner as the acceptance, and the witness having admitted that this was written by the acceptor, he

(*o*) Per Parke, B., in *Hughes v. Rogers*, 8 M. & W. 125. His Lordship's ruling was not afterwards questioned, though a bill of exceptions was tendered, *id.*

(*p*) 11 A. & E. 322; 3 P. & Dav. 179.

(*q*) Per Parke, B., in *Hughes v. Rogers*, 8 M. & W. 125.

(*r*) *Joy v. Taplin*, 15th June, 1847, Middlesex C. P., MS. The learned judge there observed, "Although the jury may see the irrelevant paper as a picture, they must not hear any evidence as to whether it was written by the defendant or not."

(*s*) *Young v. Honner*, 2 M. & Rob. 537; 1 C. & Kir. 51, S. C., *nom. Younge v. Honner*.

was asked whether the document was not signed "Robert Honner," and whether he would persevere in saying that the acceptor always signed his name "R. W. Honner?" An objection being taken to this course of cross-examination, Mr. Baron Alderson, after consulting the full Court, stated that all the Barons were of opinion that the question might be put (*t*), observing, that if, in the document which the witness admitted to be an autograph, the peculiarity existed on which he relied, as disproving the genuineness of the signature in dispute, that must be a circumstance by which to test the value of his belief on the subject. His Lordship added, that if the witness had denied the genuineness of the document produced as a test, he should not have allowed any issue to be raised on that point (*u*). The last part of this ruling is entirely in accordance with the case of *Hughes v. Rogers* (*x*), where a witness, having denied that the signature of an attesting witness to a bond was genuine, and having further denied that another paper, not in evidence in the cause, was written by that person, the Court decided that he could not be contradicted by calling persons to prove that this last paper was actually written by the attesting witness.

§ 1359. The rules deducible from these cases would seem to be these: first, that if a witness is called to prove or disprove a writing, any documents, though inadmissible in the cause, may be put into his hand on cross-examination, and he may be asked whether such documents are or are not written by the person who is supposed to have written the paper in dispute; secondly, if he denies that these documents are so written, witnesses cannot be called to contradict him, nor can the documents be shown to the jury; and lastly, if he admits that they

(*t*) In *R. v. Murphy*, 1 Arm. Mac. & Ogle, 204, Pennefather, C. J., would not allow this course of cross-examination, as his Lordship considered that it must end in comparison of handwriting; but in *R. v. Caldwell*, id. 324, Perrin, J., and Richards, B., held that a witness, who had denied the handwriting of the paper in dispute, but had admitted the genuineness of other irrelevant documents, might be questioned as to any similarity between them, provided the passages in each supposed to be like were pointed out to the witness by the hand, and were not read aloud, so as to go to the jury.

(*u*) *Young v. Honner*, 2 M. & Rob. 536.

(*x*) 8 M. & W. 123.

were written by such person, he may be further cross-examined as to the reasons for the belief he has expressed respecting the disputed paper. Thus, if he considers it genuine, on the ground of some peculiarity in the signature, he may be asked whether such peculiarity is observable in the paper he has admitted to be an autograph; if for the same reason he rejects the disputed writing as spurious, he may be asked whether, in the paper offered as a test, the same peculiarity does not prevail; and in either case, the Court would probably permit the irrelevant documents to be laid before the jury, not that they might judge of the genuineness of the paper in dispute by comparing it with these, but that they might be enabled to appreciate the testimony given by the witness (y). Whether the course proposed to be pursued in *Griffits v. Ivory* was correct or not, is another question, and one which, until some further decision is pronounced upon the subject, it would be mere speculation to attempt to resolve.

§ 1360. It remains only to be observed that the rules of evidence which govern the proof of handwriting are precisely the same in criminal as in civil proceedings; though, in favour of life and liberty, judges will naturally feel more disposed than they would be in ordinary disputes between man and man, to resist any endeavour to infringe these rules, or to introduce evidence of a doubtful description (z).

§ 1361. The *admissibility* and *effect* of private writings, when offered in evidence, has been incidentally considered, under various heads, in the preceding pages, so far as it is established and governed by any rules of law. The rest belongs to the jury, into whose province it is not intended here to intrude.

§ 1362. Having now completed the design of this Treatise, in presenting a general view of the principles and rules of the Law of Evidence, the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this

(y) *Younge v. Honner*, 1 C. & Kir. 63, per Alderson, B.

(z) *R. v. Cator*, 4 Esp. 117, 144, per Hotham, B.; *R. v. De la Motte*, 21 How. St. Tr. 810, per Buller, J.; and see 779, S. C.

branch of the law, under whatever disadvantages it may labour from the manner of treatment ; and will rise from the study of its principles, convinced, with Lord Erskine, that, with some few exceptions (a), "they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life " (b).

(a) See Index, tit. *Suggestions for amending the Law of Evidence*.

(b) 24 How. St. Tr. 966.

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